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THE MARSHALL COURT: NATIONALIZATION OF PRIVATE RIGHTS AND PERSONAL LIBERTY FROM THE AUTHORITY OF THE COMMERCE CLAUSE

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I. INTRODUCTION

The commerce clause serves a twofold purpose: It constitutes a direct source for the most significant and extensive general regulatory power of the national government,[1] and with the exception of the due process and equal protection clauses of the fourteenth amendment it serves as the most important authority for the imposition of constitutional limitations upon state powers.[2] The restrictive nature of the operation of the commerce clause as a curb upon state powers was long the more significant aspect in constitutional adjudication.[3] Its broader purpose, a source for extending the powers of the national government, was thought to be limited and generally was not comprehended.[4] Thus, legal concepts of "commerce" which had the effect of designating constitutional protections against state invasion and interference have dominated adjudications dealing with the constitutional authority of the commerce clause.[5] Congress' powers to effectuate national policy through

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1. THE CONSTITUTION OF THE UNITED STATES OF AMERICA 118 (Corwin ed. rev. & anno. 1953).

2. See, *e.g.*, Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936).

3. See, *e.g.*, CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS 18-19, 23, 33-38, 55, 78, 115, 175 (1936).

4. See the argument of Henry Clay in Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 488-89 (1841), in which he raised the specter of an act of the Congress forbidding trade and possibly ownership in negro slaves. THE CONSTITUTION OF THE UNITED STATES OF AMERICA 163-68 (Corwin ed. rev. & anno. 1953); Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, (pts. 1-3), 3 MINN. L. REV. 289, 381, 452 (1919); Stern, *The Commerce Clause and the National Economy, 1933-1946*, (pts. 1-2), 59 HARV. L. REV. 645, 883 (1946).

5. Different views may be reflected as to the relationship of government and law to existing social and economic conditions, *e.g.*:

> It is all but impossible in our own age to sense fully its eighteenth century meaning [*i.e.*, the meaning of commerce]. The eighteenth century did not

regulation remained in the background and were sometimes rejected as nonexistent.[6]

The commerce clause has not only been used in constitutional adjudication to curb state powers in order to secure the existence of national powers;[7] it has also served to secure for the Supreme Court the jurisdictional authority to nationalize and enforce private rights and personal liberty.[8] And the impact of state powers upon private rights and personal liberty has often provided the impetus for the nationalization and enforcement of private rights and personal liberty through constitutional adjudication.[9]

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separate by artificial lines aspects of a culture which are inseparable. It had no lexicon of legalisms extracted from the law reports in which judicial usage lies in a world apart from the ordinary affairs of life. Commerce was then more than we imply now by business or industry. It was a name for the economic order, the domain of political economy, the realm of a comprehensive public policy. It is a word which makes trades, activities and interests an instrument in the culture of a people. If trust was to be reposed in parchment, it was the only word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation.

HAMILTON & ADAIR, THE POWER TO GOVERN 62-63 (1937).

6. See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 156-81 (1937). For a notable exception to the general failure to see the extent of the national powers caused by concentration upon state power limitations, see the opinion of Mr. Chief Justice Waite in Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 9 (1877):

> The powers thus granted are not confined to the instrumentalities of commerce . . . known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat . . . and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

7. The role of the Supreme Court has not been to limit state powers in order to preserve national powers; and, conversely, it is not an essential function of the Supreme Court to limit national powers in order to preserve the continued existence of state powers. See, *e.g.*, POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 142-79 (1956); Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

8. Freedom of movement, freedom of association and other entrepreneurial aspects may have a close assimilation to the privileges and immunities, due process, and equal protection clauses of the Constitution. See, *e.g.*, Edwards v. California, 314 U.S. 160 (1941); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

9. See Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823); Freund, *Review and Federalism*, in SUPREME COURT AND SUPREME LAW 86, 95 (Cahn ed. 1954). When a problem is thought to extend to "fundamental rights"—beyond the legal rights drawn from the freedom relating to business or personal associations—it occasionally is argued that the Supreme Court ought to use a constitutional authority other than the commerce clause. *Compare* Douglas, J. in Edwards v. California, 314 U.S. 160, 177-81 (1941), *with* the various opinions in Morgan v. Virginia, 328 U.S. 373 (1946). But whatever national policy or social value underlies the use of the commerce

A study of the Marshall Court must give due weight to the social and economic conditions which constituted the source of the adjudications from the commerce clause.[10] Further, it may be helpful to preserve the Marshall Court's understanding of its authority to formulate national law from the authority of the commerce clause.[11] But not the least important are studies which pertain to the contributions and failings of the Marshall Court in law and legal history,[12] and are not necessarily related to such factors as the social and economic circumstances and theories relating to the Constitution which may have influenced the particular adjudications.[13]

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clause or another provision as constitutional authority the complainant must have a peculiar relationship to the policy or social value in order that he may receive remedial benefits alleviating an injury which constitutes a legal injury. *But cf.* Engel v. Vitale, 370 U.S. 421, 430-31 (1962), where the enforcement of policy or social value was said not to require the justification of an injury for remedial alleviation, though an injury possibly existed supporting the use of the freedom of religion clause as constitutional authority.

10. See 1 DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1606-1865, 472-84 (1946).

11. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 20, 29 (1937).

12. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), is much more than the initial pronouncement of the Supreme Court upon the scope of the national authority which the Congress may use to regulate commerce and the limitations which the Court may impose upon the states by the national law. By comprehending it in its entire historical and legal setting, one might gain special insight into the pressures of the present. It was Mr. Justice Holmes who said:

> [H]istory is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.

Holmes, *Law in Science and Science in Law,* 12 HARV. L. REV. 443, 452 (1899), reprinted in HOLMES, COLLECTED LEGAL PAPERS 210, 225 (1921). Maitland said that historical analysis had the job "of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow." 3 COLLECTED PAPERS OF FREDERICH WILLIAM MAITLAND 439 (Fisher ed. 1911).

13. The great teacher, James Bradley Thayer, has emphasized that whatever one's approach his constitutional analysis must be tentative:

> The study of Constitutional Law is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life.
>
> In this wide and novel field of labor our judges have been pioneers. There have been men . . . like Marshall, Shaw and Ruffin, who were sensible of the true nature of their work and of the large method of treatment which it required, who perceived that our constitutions had made them, in a limited and secondary way, but yet a real one, coadjutors with the other departments in the business of government; but many have fallen short of the requirements of so great a function. Even under the most favorable circumstances, in dealing with such a subject as this, results must often be tentative and temporary. Views that seem adequate at the time, are announced, applied, and developed; and yet, by and by, almost unperceived, they melt away in the light of later experience, and other doctrines take their place.

1 THAYER, CASES ON CONSTITUTIONAL LAW v-vi (1895).

II. BRIG WILSON

One of the earliest reported cases under the commerce clause was the *brig Wilson* case, decided in the May 1820 term of the United States Circuit Court for Virginia.[14] The *Wilson* case is significant for showing the Marshall Court's use of theory about the Constitution, as the basis for constitutional interpretation and authority for the formulation of national law.[15] A main function of the administration of the judicial

14. The Wilson v. United States, 30 Fed. Cas. 239 (No. 17846) (C.C.D. Va. 1820). The districts of Virginia and North Carolina were included in Chief Justice Marshall's circuit. See I & II BROCKENBROUGH, REPORTS OF CASES DECIDED BY THE HONORABLE JOHN MARSHALL IN THE CIRCUIT COURT OF THE UNITED STATES (1837). The original Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, in addition to the creation of the Supreme Court of the United States and thirteen district courts, created three circuit courts: the Eastern Circuit consisting of the districts of New Hampshire, Massachusetts, Connecticut and New York; the Middle Circuit, of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia; and the Southern Circuit, of the districts of South Carolina and Georgia. By the original act the membership of the circuit courts in each district consisted of "any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum." Judiciary Act of September 24, 1789, ch. 20, § 4, 1 Stat. 73. The original Jay Court found the tasks of sitting on circuit courts much too burdensome as they stated in an urgent letter addressed to President Washington, in which it was stated that "the task of holding twenty-seven Circuit Courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which, considering the extent of the United States and the small number of Judges, is too burdensome." 1 AM. STATE PAPERS, Misc., 52, quoted in FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 22 (1928).

In 1793 the original Judiciary Act was amended to provide for circuit courts of each district to consist of one justice of the Supreme Court together with the judge of the district, but in the absence of the district judge "such circuit court may consist of the said judge of the Supreme Court alone." Act of March 2, 1793, ch. 22, § 1, 1 Stat. 333. The Act of Feb. 13, 1801, ch. 4, § 7, 2 Stat. 89, created circuit courts with life-appointed circuit judges. This act was repealed during the Jefferson administration and the original Judiciary Act reinstated. Act of March 8, 1802, ch. 8, 2 Stat. 132. The return to circuit riding required the justices of the Supreme Court to man two courts, the circuit court, essentially a nisi prius court, and the Supreme Court, essentially an appellate court. This system lasted until the Circuit Court of Appeals Act of 1891 established the circuit court of appeals as an appellate court. See Act of March 3, 1887, ch. 347, 24 Stat. 492; Act of March 3, 1891, ch. 517, 26 Stat. 826. See also Stuart v. Laird, 5 U.S. 299 (1 Cranch) (1803); FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT, 4-55, 69-77, 86-89, 96-102, 219; HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 42-47, 79-80 (1953); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 29-90, 269-73 (Rev. ed. 1937).

Broadly speaking, the district courts were admiralty courts in their origin with some criminal jurisdiction, and the circuit courts were diversity of citizenship courts with some criminal jurisdiction. Judicary Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 76, 78. In addition, the circuit courts were given limited appellate jurisdiction over the district courts. There could be appeal "from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs" and "in [civil actions in a disttrict court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs. . . ." Judiciary Act of Sept. 24, 1789, ch. 20, §§ 21, 22, 1 Stat. 83. The *brig Wilson* case obviously was considered an appeal in admiralty jurisdiction.

15. See 4 BEVERIDGE, THE LIFE OF JOHN MARSHALL 427-29 (1919).

powers in the Marshall Court was to determine where the nation's powers of government existed. In the performance of this unique function lawyers had great difficulty finding, and then analyzing, the legal issues which would assist the Court in making such determinations. The Court's determinations of constitutional interpretation in support of its formulations of national law made it appear that the Court was allocating governmental authority between the national government and the member states. While the Court's decrees recognized the necessity for the judicial enforcement of private rights, its opinions consisted largely of discussion on the general subject of the respective powers of government.

The complexities inherent in the administration of the nationalized judicial authority in the period of the Marshall Court must be appreciated, yet the Court may be criticized in terms of judicial responsibility for its extensive failings to restrict the bases of its determinations to intellectual matters pertinent to principles of law and legal standards. The legal issues which the Marshall Court pretended to adjudicate were more often drawn from the abstract—and oftentimes mythical—theories and doctrines about the Constitution than from the authoritative language of the Constitution and the background circumstances involved in its making. In its effort to resolve the conflict between the erroneous states' rights theories about the Constitution (that the member states contained powers of sovereignty restricting the national government), and the erroneous assumptions of the federalists (that the various powers and functions of the national government had to be withdrawn from the member states), the Court virtually turned the judicial function into an arbitral process for adjudicating conflicts of state policies with national powers. The Marshall Court thus initiated a period of judicial administration in which the Court's pretended function was to make declarations on the division of authority between the national government and the member states. An emotional maze of abstract constitutional theories and doctrines understandably hung over the work of the Court. Moreover, the abstract theories about the Constitution soon became influenced by the pressures of political forces. Such influences gained recognition because of the Court's failure to restrict the administration of its judicial authority to the essentials of the legal issues of a particular case. In order to allocate governmental authority between the national government and the member states, the Court gave the appearance of involving itself with the various public policy considerations concerning the national bank, internal improvements, slavery and the various social problems.[16] Once this mode

16. *E.g.*, Dred Scott v. Sandford, 60 U.S. (19 How) 393 (1857). In *Dred Scott*, the Court attempted an absolution of the great slavery question that had so prostrated

of adjudication had taken over the judiciary, the abstract theories and doctrines about the Constitution were easily subject to influence by the broader social and political issues of the period.

The brig Wilson was libelled in the district court for violation of the internal revenue act of March 2, 1799[17] allegedly caused by the captain's failure to declare the ship's liquor and other stores for the crew and to pay the statutory duties,[18] and for violation of the act of Congress which sought to prevent the importation of persons of color into states where their admission was prohibited by the law of that state.[19] While enroute

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the weak national government, by pages and pages of pronunciamentoes on constitutional doctrine. See especially the opinion of the Court, penned by Chief Justice Taney, beginning at page 399. Mr. Justice Curtis' dissenting opinion, which begins at page 564, was published as an absolutionist pamphlet, certainly an indication that the Court was thought to be journalizing and not adjudicating. See SWISHER, ROGER B. TANEY 485-523 *passim* (1936). Chief Justice Hughes has characterized the *Dred Scott* case as an adjudication by which the Court "suffered severely from self-inflicted wounds." HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928). See also 2 CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 266-77 (1896); HAINES & SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1835-1864, 393-435 (1957).

17. Act of March 2, 1799, ch. 22, 1 Stat. 627.

18. The Wilson v. United States, 30 Fed. Cas. 239, 240 (No. 17846) (C.C.D. Va. 1820):

> The four first counts of the libel, charged, that the said spirits, etc., were imported, and brought into the United States . . . by sea . . . from some foreign port, unknown, into the port of Norfolk, in Virginia, on board the brig Wilson, which were not mentioned in the manifest and report made by the commander of the vessel, but were carefully concealed, for the purpose of evading the payment of the duty thereon, and were discovered by an agent, specially appointed by the collector of the port of Norfolk, after diligent search, etc.

19. The Act of Feb. 28, 1803, ch. 10, § 1, 2 Stat. 205, prohibited the master or captain of any ship or vessel from importing into any port of a member state "any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope," where importation of such persons was prohibited by state law. The penalty for violation was the forfeiture of $1,000 for each person of color imported in violation of state law. Section 2 prohibited entry of a ship into any port situated in a state that prohibited negroes, free or slave. Thus the act of Congress was as applicable to the northern free states as to the southern slave states. If a ship made an entry in violation of the act of the Congress the ship was subject to forfeiture to the United States Government, with one-half of the proceeds from the sale of the ship to go to "such person or persons . . .on whose information the seizure on such forfeiture shall be made."

The act provided further:

> That no ship or vessel arriving in any of the said ports or places of the United States, and having on board any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope as aforesaid, shall be admitted to an entry. And if any such negro, mulatto, or other person of colour, shall be landed from on board any ship or vessel, in any ports or places aforesaid, or on the coast of any state prohibiting the admission or importation, as aforesaid, the said ship or vessel, together with her tackle, apparel, and furniture, shall be forfeited to the United States, and one half of the net proceeds of the sale on such forfeiture shall inure and be paid over to such person or persons on whose information the seizure on such forfeiture shall be made.

Act of Feb. 28, 1803, ch. 10, § 2, 2 Stat. 205. The fifth count in the libel, charged:

from Venezuela to Norfolk the brig Wilson had put in at St. Thomas, where "the crew . . . was reinforced, by the addition of . . . eighteen seamen, principally people of colour, and all free."[20] The district court decreed that "the 31 demijohns of brandy, the 13 cases of gin, and merchandise, according to schedule, were forfeited to the United States" for not reporting the ship's stores to the port collector for the payment of duties thereon;[21] and that "the said brig Wilson, together with her guns, stores, tackle, apparel, and furniture" was forfeited to the United States for having brought persons of color into the United States.[22] The circuit court dismissed the libel charged against the brig Wilson and reversed so much of the decree as condemned the ship, with the award of complete restitution of the ship with all her paraphernalia intact.[23]

The Marshall Court's usual mold of constitutional interpretation

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> [T]hat the said brig Wilson . . . had on board three persons of colour, not being native citizens or registered seamen of the United States, or seamen, natives of countries beyond the Cape of Good Hope, the admission or importation of such persons being prohibited by the laws of Virginia; and that the said three persons of colour were landed from on board the said brig, contrary to the form of the act of congress, whereby the said vessel, her tackle, etc., had become forfeited to the United States.

The Wilson v. United States, 30 Fed. Cas. 239, 240 (No. 17846) (C.C.D. Va. 1820).

20. *Id.* at 241. According to depositions taken from the officers, the brig Wilson:

> [T]hen sailed from St. Thomas, on an intended cruise of six months. At this time, the crew consisted of about eighty or ninety, inclusive, and among them were many people of colour. During the cruise, two Spanish schooners, and one English ship, having Spanish property on board, were captured. The ship, and one of the schooners, were sent under prize masters to Marguerita, and the other schooner was abandoned, after some mutineers from the Wilson were put on board. From this schooner, they took on board of the Wilson, as prize, various articles, among them, demijohns of brandy, cases of gin, etc. The brandy and gin, and other small articles, were added to the stock of stores for the crew, and some of the gin was repeatedly afterwards served out to the crew. Several days before they reached the United States, when the Wilson was on the outer edge of the Gulf Stream, she fell in with an American schooner, called the Wasp, bound for Baltimore, and put on board of her several articles of merchandise, which were captured from the Spanish schooner, and Thomas B. Grey, of the Wilson, was sent in with the goods to Baltimore. The Wilson arrived at Norfolk, on the 27th of October, 1819, having put in to refit, with intent to depart and resume her cruise in a short time.

Ibid.

21. *Ibid.*

22. *Ibid.* The decree of the district court had followed the form of the statute as set forth in the fifth count of the libel, by finding that the persons of color were "landed from the said brig Wilson." The circuit court showed, however, that "the forfeiture is not incurred by a person of colour coming in as a part of a ship's crew, and going on shore." The Wilson v. United States, 30 Fed. Cas. 239, 245 (No. 17846) (C.C.D. Va. 1820).

23. The court also determined that the captain of the brig Wilson had not violated the revenue act by failing to report the ship's stores for the crew. It is not clear, however, whether the district court's decree of forfeiture for the liquor and other stores was reversed and restitution made, though such reversal and restitution would appear to follow from the court's opinion. *Id.* at 241-42.

was to determine an act of the Congress valid by declaring an alienation of like powers of government from the member states. But where the revenue act was concerned[24] the Constitution had provided for the requisite alienation from the states by the prohibition of state duties on imports and exports.[25] As the Constitution by this prohibition had promulgated the necessary exclusive authority in the national government to impose import and export duties, the circuit court was able to move directly to questions of interpretation and application of the act to the circumstances of the case. Ships or vessels of war were exempt from making a report and entry of their stores for import duties.[26] The armed privateer was held to be within the exemption, so long as not engaged in the importation of goods or persons, and the forfeiture of the ship's liquor stores for failure to report and enter was not authorized by the statute.[27]

The legality of the forfeiture of the ship and her paraphernalia, under the authority of the Act of February 28, 1803—forbidding the importation of "negroes, mulattoes, or other persons of colour" into ports where the importation of such persons was prohibited by state law—moved to the crux of the difficulties the Marshall Court had with the process of adjudication under the authority of the Constitution.[28] The persons of color on board the brig Wilson were free citizens of a

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24. Act of March 2, 1799, ch. 22, 1 Stat. 627.

25. U.S. CONST. art. I, § 10:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

26. *And be it further enacted,* That it shall not be necessary for the master, or person having the charge or command of any ship or vessel of war, or of any ship or vessel employed by any prince, or state, as a public packet for the conveyance of letters and dispatches, and not permitted by the laws of such prince or state, to be employed in the transportation of goods, wares, or merchandise, in the way of trade, to make such report and entry as aforesaid. Act of March 2, 1799, ch. 22, § 31, 1 Stat. 651.

27. The Court also expressed a policy ground for its decision:

It is also an argument, which deserves consideration, that the policy of the United States has been unfriendly to the sale, in our ports, of prizes made by foreign privateers, on nations with whom we are at peace. Some of our treaties contain express stipulations against it; and the course of the government has been to prohibit the practice, even where no specific engagements bind us to do so. Were the revenue laws, applicable to privateers, and to their prizes and prize goods, they would give a right to introduce those goods in opposition to the avowed and uniform policy of the government. The doctrine, that the validity of prizes could not be adjudged in our ports, would be of little importance, if they could be brought in and sold.

The Wilson v. United States, 30 Fed. Cas. 239, 242 (No. 17846) (C.C.D. Va. 1820)

28. The Wilson v. United States, 30 Fed. Cas. 239, 241, 244-45 (No. 17846) (C.C.D. Va. 1820).

foreign state. They had not been landed for importation into Virginia and thus the act of the Congress had not been violated. Notwithstanding, the circuit court made a determination of the constitutional validity of the act prior to the judicial function of construing the statute and formulating national law therefrom. In turn, the constitutional validity of the act had to be posited upon the alienation of authority from the member states under the Constitution. The ultimate question, therefore, was how the court could follow this usual mode of adjudication, basing Congress' authority to prohibit importation of persons of color upon the alienation of the governmental authority from the member states.

The Constitution had denied the Congress the power to prohibit "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit."[29] This prohibition was to last for twenty years after the adoption of the Constitution—until the year 1808. The act of 1803 was in compliance with the limitation on Congress' powers, having provided that the act was applicable solely as an aid to the enforcement of a state enacted policy.[30] Valid application of the act of the Congress thus was dependent on the state act being valid. The circuit court, Marshall presiding, faced a conflict with the usual mode of constitutional adjudication by which powers in the Congress over subjects of government policy required a prerequisite or simultaneous finding that the subject or object of government had been alienated from the member states. Marshall overcame this state-of-mind conflict which the court had created for itself by giving no legal effect to the 1808 closing date for limitations upon Congress' powers. The importation of persons of color limitation on Congress' otherwise exclusive powers was held to continue subject to Congress' authority to remove it. Thus, alienation of the states' powers to control importation of persons was avoided. There remained, however, the supposed necessity of validation of the

29. U.S. CONST. art. I, § 9:
The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

30. The act clearly established a national antislave policy by providing that federal revenue officers assist in maintaining similar policies of the particular states:
And be it further enacted, That it shall be the duty of the collectors and other officers of the customs, and all other officers of the revenue of the United States, in the several ports or places situated as aforesaid, to notice and be governed by the provisions of the laws now existing, of the several states prohibiting the admission or importation of any negro, mulatto, or other person of colour, as aforesaid. And they are hereby enjoined vigilantly to carry into effect the said laws of said states, conformably to the provisions of this act; any law of the United States to the contrary notwithstanding.
Act of Feb. 28, 1803, ch. 10, § 3, 2 Stat. 206.

federal act, with concurrent alienation of state powers. Marshall began with the broad generalization that "the whole power of commerce" was comprehended in the commerce clause, which thereby had removed all the subjects of commerce from the states' police powers.[31] His chief concern was to show that the regulation of vessels and the imports of those vessels entering American ports, whether from foreign countries or from ports within the United States, were matters exclusively within the authority of the national government and completely outside the pale of the member states. The commerce clause was essential to the nation's sovereign powers to the degree that it gave the national government the single, unitary hand required for dealing with other nation-states. "It will readily be admitted," Marshall commenced his teachings on the Constitution, "that the power of the legislature of the Union, on this subject, is derived entirely from [the commerce clause]."[32] He followed with his accustomed series of rhetorical questions, appropriately placed in a logical sequence and intermixed with conclusive declarations, in order to leave no doubt that the writing of the Constitution required those particular declarations that were to constitute the legal formulations of the case:

> What is the extent of this power to regulate commerce? Does it not comprehend the navigation of the country? May not the vessels, as well as the articles they bring, be regulated? Upon what principle is it, that the ships of any foreign nation have been forbidden, under pain of forfeiture, to enter our ports? The authority to make such laws has never been questioned; and yet, it can be sustained by no other clause in the constitution, than that which enables congress to regulate commerce. If this power over vessels is not in congress, where does it reside? Certainly it is not annihilated; and if not, it must reside somewhere.[33] Does it reside in the states? No American poli-

31. The Wilson v. United States, 30 Fed. Cas. 239, 243 (No. 17846) (C.C.D. Va. 1820).

32. *Id.* at 242.

33. The constitutional patriots—including those who became judges—were prone to assimilate sources of power as applications of the location of sovereignty. The fact that the Congress was constituted with powers to regulate ships and goods and passengers, as well as the perils of navigation, would not, and actually did not, prevent the states in their general welfare and police powers from regulating the same subjects. But in abstract constitutional theory and structure the justices of the Marshall Court never understood how this could be so. Powers of government had to be unitary, and all subjects and objects of government that fell within such powers likewise had to be unitary. They could exist in but one government, as if governments were like a potentate, a sovereign. Such were the confusions derived from the abstractions of constitutionalism. See, *e.g.*, BAUER, COMMENTARIES ON THE CONSTITUTION 1790-1860, 212-52 (1952).

> tician has ever been so extravagant as to contend for this. No man has been wild enough to maintain, that, although the power to regulate commerce, gives congress an unlimited power over the cargoes, it does not enable that body to control the vehicle in which they are imported; that, while the whole power of commerce is vested in congress, the state legislatures may confiscate every vessel which enters their ports, and congress is unable to prevent their entry.[34]

Thus, Marshall turned from the substance of the statute (control over the importation of persons) to the means used by Congress (its powers over commerce). The commerce powers belonged exclusively to the national government, Marshall said, and the regulation of vessels was necessarily a part of those powers. The Congress had determined a national policy, and in turn had selected and exercised whatever of its delegated powers it considered the most appropriate to an effectual execution of such policy.[35] It was not the court's function to act in an advisory capacity on the general meaning of Congress' powers to regulate commerce. Congress' authority to regulate the navigation and docking of ships, and other aspects of commerce, was the means to effectuate a national policy to prevent the importation of persons of color. But it did not follow that because the Congress used the various ingredients of commerce so as to execute an antislave policy that the navigation or the docking of ships, or regulating the importation of persons of color, were outside the police and general welfare functions of the nation's member states. When Marshall alienated the same or like powers and functions of government from the member states in order to formulate the nationalized law of a particular case, he intermixed an accurate construction of the political and legal foundations of the Constitution with an abstraction about the Constitution that was erroneous in theory and impossible of fulfillment.

Marshall assumed, at least for the sake of argument, "that a law, forbidding a free man of any colour, to come into the United States, would be void, and that no penalty, imposed on him by congress, could

34. The Wilson v. United States, 30 Fed. Cas. 239, 242-43 (No. 17846) (C.C.D. Va. 1820).

35. See, *e.g.*, Champion v. Ames, 188 U.S. 321 (1903), in which a national anti-lottery policy, effectuated by the mechanics and ingredients of commerce, was validated; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), in which a national labor-management relation policy was validated; United States v. Darby, 312 U.S. 100 (1941), in which a national policy of minimum wages and hours and anti-child labor was validated. See also Yakus v. United States, 321 U.S. 414 (1944); Wickard v. Filburn, 317 U.S. 111 (1942).

be enforced."[36] By this, he presumed the possible judicial authority to impose fundamental law and fundamental right limitations upon particular applications of Congress' power to regulate commerce. Marshall apparently did not conceive of judicially-enforced limitations on Congress' powers from the authority of a legal definition of what was or was not commerce.[37] According to his thinking, the meaning of commerce in terms of national power was a matter of legislative policy, not of legal principle: "From the adoption of the constitution . . . the universal sense of America has been, that the word 'commerce,' as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce."[38] Nevertheless, Congress' authority to use the regulation of navigation to effectuate the antislave policy would have been valid even if the migration and importation of persons clause had been omitted from the Constitution. The migration and importation of persons clause was construed as a limitation upon Congress' otherwise complete and exclusive power to regulate commerce.[39]

After validating the act of the Congress under the authority of the Constitution, by limiting state authority over commerce, Marshall turned finally to the only substantial legal question presented in the *brig Wilson* case: "Is this case within the act of congress, passed the 28th of February 1803?"[40] The act provided:

> [N]o master or captain of any ship or vessel . . . shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman, of the United States, or seamen natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any

36. The Wilson v. United States, 30 Fed. Cas. 239, 243 (No. 17846) (C.C.D. Va. 1820).

37. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824), Chief Justice Marshall discusses the nationalization of the powers of commerce:

> It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from their abuse. They are the restraints on which the people must often rely solely in all representative governments.

38. The Wilson v. United States, 30 Fed. Cas. 239, 243 (No. 17846) (C.C.D. Va. 1820).

39. *Ibid.*

40. *Ibid.*

> state, which, by law, has prohibited, or shall prohibit, the admission, or importation of such negro, mulatto, or other person of colour.[41]

The crew of the Venezuelan armed privateer, many of whom were taken on board at St. Thomas, and others from Spanish and British ships captured as prizes on the high seas, did not come within the language of the exemption of the act as being "seamen [who were] natives of countries beyond the Cape of Good Hope." The court had to admit that the crew were not "natives of countries beyond the Cape of Good Hope."[42] But it would have constituted an unfriendly act to a foreign power, indeed, almost an act of war, to have enforced a forfeiture against the armed privateer of a foreign state. Likewise it would have constituted an unfriendly act to a foreign state, and a violation of the law of nations, to have refused entry of the brig Wilson into the port of Norfolk on account of the colored crewmen.[43] Thus for reasons of sound policy, drawn from the law of nations, the circuit court rejected the administrative construction which had been given the act and reversed the forfeiture, thus awarding restitution of the brig Wilson to its captain.

The court's exercise of judicial discretion—in the recognition of the law of nations as a part of the laws of the United States—did not conflict with Congress' general policy incorporated in the act. Marshall emphasized that although the act was not applicable to the free negro crew aboard the brig Wilson because it would have resulted in an unfriendly act toward a foreign state, such an exercise of power was not necessarily beyond the authority of the Congress.[44] It was the court's prerogative

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41. Act of Feb. 28, 1803, ch. 10, § 1, 2 Stat. 205.

42. The Wilson v. United States, 30 Fed. Cas. 239, 244 (No. 17846) (C.C.D. Va. 1820). The Court found that the wording of the exemption was counterbalanced by the language of the act which required forfeiture of the ship only "if any such negro, mulatto, or other person of colour, *shall be landed* from on board any ship, or vessel, in any of the ports . . . or on the coast of any state prohibiting the admission or importation. . . ." Act of Feb. 28, 1803, ch. 10, § 2, 2 Stat. 205. (Emphasis added.) The Court construed this language as not applicable to the colored crewmen who came ashore temporarily but were to leave the Virginia port with the ship.

43. It would also have conflicted with commercial treaties with foreign powers and especially with the recent treaty between the United States and the Barbary powers. For this reason, in the judicial construction of the act, Congress could not have intended "to refuse an entry to a French, a Spanish, an English, or a Portugese merchant vessel, in whose crew there was a man of colour." The Wilson v. United States, *supra* note 42.

44. Authority in the Congress to repeal or amend portions of existing treaties has been recognized elsewhere. See, *e.g.*, legal opinion of Attorney General Caleb Cushing to Jefferson Davis, the Secretary of War (with reference to the Act of July 7, 1798, ch. 67, *An Act to declare the treaties heretofore concluded with France, no longer obligatory on the United States*, 1 Stat. 578, 6 OPS. ATT'Y GEN. 291, 296-97 (1854); the opinion of Mr. Justice Curtis in Taylor v. Morton, 23 Fed. Cas. 784, 785-88 (No. 13799) (C.C.D. Mass. 1855), *aff'd*, 67 U.S. (2 Black) 481 (1862); and the Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581, 600-11 (1889).

to determine what aspects of the law of nations, being a part of the law of the United States, constituted limitations upon Congress' powers under the Constitution. It was held that the act of the Congress should not be construed and enforced to have the effect of an unfriendly act, and to be in conflict with the law of nations, "unless the words be such as to admit of no other rational construction."[45] Marshall emphasized that Congress' powers to regulate commerce "warrants every act of national sovereignty, which any other sovereign nation may exercise over vessels, foreign or domestic, which enter our ports."[46] The power to regulate the means of national commerce, in order to effectuate a national antislave policy, was recognized as being complete and indivisible as that of any other nation-state. It was not subject to any constitutional limitations by the powers of the member states.

In summary, the Marshall Court's mode of adjudication under the authority of the Constitution, which recognized national authority by the alienation of state powers, would have required the invalidation of the act of Virginia "to prevent the migration of free negroes and mulattoes."[47] Marshall avoided the result by determining that the validity of the state act did not end with the expiration of the importation of persons limitation on Congress' powers. By this construction, the alienation of state powers over the subject of importation of persons was avoided.[48] The existence of state powers over the subject of the importation of negroes as slave or free persons continued, and the circuit court did not actually stir the question of whether the continuance of state powers over the subject was at Congress' discretion or was independent of it. The state act then was valid because of the importation of persons limitation

45. The Wilson v. United States, 30 Fed. Cas. 239, 245 (No. 17846) (C.C.D. Va. 1820).

46. *Ibid.*

47. Act of Dec. 12, 1793, ch. 23, § 2, 1 Va. Stat. 239, provided:

> Every master of a vessel, or other person who shall bring into this commonwealth by water or by land, in any vessel, boat, land carriage or otherwise, any free negro or mulatto, shall forfeit and pay for every person so brought, the penalty of one hundred pounds lawful money; one half to the commonwealth, and the other half to the person who shall inform thereof; to be recovered in an action in debt or information in any court of record, and the defendant in every case shall be ruled to give special bail.

The statute was reenacted on March 2, 1819, by *An act reducing into one, the several acts concerning Slaves, Free Negroes and Mulattoes.* 1 VA. REV. CODE OF LAWS, 438, ch. 111, § 65 (1819).

48. In the course of writing to Mr. Justice Story about the excitement over the circuit court opinion of Mr. Justice Johnson, in Elkison v. Deliesseline, 8 Fed. Cas. 493, (No. 4366) (C.C.D. S.C. 1823), Marshall wrote that he had purposely avoided constitutional invalidity of the Virginia statute because, as he stated it: "As I am not fond of butting against a wall in sport, I escaped on the construction of the act." *Quoted in* 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 626 (Rev. ed. 1947).

upon the national power. The court declared accordingly:

> The language, both of the constitution and of the act of congress, shows, that the forfeiture was not intended to be inflicted in any case but where the state law was violated. . . . This is not inflicting a penalty for the violation of a state law, but is limiting the operation of the penal law of the United States, by a temporary demarcation given in the constitution. The power of congress to prevent migration or importation, was not to be exercised prior to the year 1808, on any person whom any of the states might think proper to admit. All were admissible who were not prohibited. It was proper, therefore, that the act of congress should make the prohibitory act of the state, the limit of its own operation.[49]

Presumably the Congress could act at any time to remove the importation of persons limitation on its powers. Congress was recognized as retaining those supreme powers of sovereignty over the *means* to effectuate a national antislave policy, and the court was saved from the necessity of alienating those *subjects* of the national policy from the states' police and welfare powers.

III. Elkison v. Deliesseline

Elkison v. Deliesseline further illustrates the Marshall Court's use of the commerce clause as authority for the judicial enforcement of the traditional legal principles of private rights and individual liberty.[50] The various aspects of commerce in the case were incidental to the more essential legal issues of fundamental liberty. The case arose in 1823, just prior to *Gibbons v. Ogden,*[51] when the officialdom of Charleston, South Carolina, seized for sale into slavery the crews of the British merchant ships anchored in the Charleston harbor.[52] The powers of the national government to regulate commerce were brought in issue solely because they provided the Circuit Court for the District of South Carolina with the requisite constitutional authority for decreeing the state acts void. The court's authority to declare the state's free negro acts void was in turn a prerequisite to the court's exercise of its jurisdictional authority

49. The Wilson v. United States, 30 Fed. Cas., 239, 245 (No. 17846) (C.C.D. Va. 1820).

50. 8 Fed. Cas. 493 (No. 4366) (C.C.D. S.C. 1823).

51. 22 U.S. (9 Wheat.) 1 (1824)

52. The action was taken under the act of the South Carolina legislature, *An ACT for the better regulation and government of Free Negroes and Persons of Colour, and for other purposes,* No. 2277, 7 S.C. Stat. 461 (McCord 1840).

to formulate the national law essential to the judicial enforcement of private rights and personal liberty.

Elkison v. Deliesseline involved the most fundamental aspects of the general law of England and the United States, under which the individual's natural rights of life and liberty could not be denied except through a court decree.[53] Since enslavement and forfeiture of a freeman conflicts with the natural rights of man, a court order decreeing the enslavement of a free citizen could not have been based upon any acceptable legal principle. The problem had arisen when South Carolina, by various acts of its legislature, had authorized and directed the seizure and incarceration of free citizens of color and the sale of free citizens of color into slavery.

South Carolina's free negro acts grew out of a near panic resulting from the revelation of a plot for a slave uprising allegedly instigated by a free negro carpenter named Denmark Vesey.[54] Because Denmark Ve-

53. The Constitution by reference, so to speak, embodied those principles of the common law which in turn were drawn from the fundamental documents of the constitutional history of England. For a court of the United States to refuse to recognize those basic principles of the natural rights of a free man would have constituted a failure to recognize the Constitution of the United States. The new nation incorporated into the legal structure (or the judicial powers) those principles of law that reflected man's eternal quest for freedom, whether it be from his God, his state or sovereign, or an institutionalized patriarch.

The second part of the first book of BLACKSTONE'S COMMENTARIES, titled "Of the Rights of Persons," and especially chapter I, "Of the Absolute Rights of Individuals," constituted the essential authority and source for the law as formulated in *Elkison v. Deliesseline.* Blackstone spoke of the law "Of Persons" as connoting that ". . . the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature. . . . Hence it follows, that the first and primary end of human laws is to maintain and regulate those *absolute* rights of individuals." BLACKSTONE'S COMMENTARIES Bk. 1, ¶ 124. The primary articles or branches of absolute rights were "the right of personal security, the right of personal liberty, and the right of private property." *Id.* at ¶ 129. In "the language of the great charter . . . no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land." *Id.* at ¶ 135. In addition to the enactment of the great charter, 25 Edw. 1, c. 1 (1297) the petition of right, 3 Car. 1, c. 1 (1627) provided that "no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law." By 16 Car. 1, c. 10 (1640) and 31 Car. 2, c. 2 (1679) the habeas corpus act which Blackstone referred to as "that second *magna carta,* and a stable bulwark of our liberties" the prisoner was entitled, as a matter of absolute right to review of his detention in order that no one be detained in prison except in compliance with law. BLACKSTONE'S COMMENTARIES Bk. 1, ¶¶ 135-38.

54. See APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 268 (1943); CARROLL, SLAVE INSURRECTIONS IN THE UNITED STATES 1800-1865 12 (1938). The Denmark Vesey revolt had been well organized; the plan was for a Sunday insurrection on July 14, 1822. The arsenal and guardhouse were to be seized, Charleston was to be burned and white citizens were to be shot on sight, as were negroes who did not participate in the uprising. The negroes who informed were to be sought out and shot. Following annihilation of the white population, Vesey and his leaders planned to seize enough ships standing in the harbor to escape to asylum in Santo Domingo. Available statistics show that the population of the Charleston district in 1820 consisted approximately of 106,616 persons,

sey was a free negro and was not a native of South Carolina, it was apparently assumed that any person having the status of a free negro endangered the security of the white citizens of the state. The security of white citizens living in and around Charleston was thought to be endangered most of all by the entry of free negroes on board trading ships.[55] The act of the state, "for the better regulation and government of free negroes and persons of color," sought to effectuate a statutory prohibition against the entry of free negroes into the state, whether for a temporary stay as a member of a ship's crew or for permanent residence.[56] Negroes and presumably all persons of color employed on ships

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of which 82,899 were negroes and the population of the city proper was 24,780, of which 15,750 were negroes.

When information of the planned uprising of the negro population had been received, a special court of two magistrates and five freeholders sat in secret proceedings for several weeks. At the close of the proceedings in August, 1822, a total of 131 negroes had suffered arrest as participants in the planning of the uprising; of these, 35 were executed and 32 were deported. See MORGAN, JUSTICE WILLIAM JOHNSON 126-46 (1954); HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA 148-54 (1914); Lofton, *Denmark Vesey's Call to Arms,* 33 J. NEGRO HISTORY 395 (1948); Phillips, *The Slave Labor Problem in the Charleston District,* 22 POL. SCI. Q. 416, 429-33 (1907).

55. In the fall of 1822, just after the trials following the Vesey plot, white residents of Charleston humbly memorialized the legislature of South Carolina:

> To send out of our state, never again to return, all free persons of color. . . . They form a third class in our society, enjoying more privileges than slaves, and yet possessing few of the rights of the master; a class of persons having and exercising the power of moving unrestrained over every part of the State; of acquiring property, of amassing wealth to an unlimited extent, of procuring information on every subject, and of uniting themselves in associations or societies—yet still a class, deprived of all political rights, subjected equally with slaves to the police regulations for persons of color, and sensible that by no peaceable and legal methods can they render themselves other than a degraded class in your society. Thus it appears that they have sufficient of liberty to appreciate the blessings of freedom; and are sufficiently shackled to be sensible they enjoy comparatively few of those blessings.

II DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 105-06 (1907). Because freed persons of color threatened the security of the institution of slavery, it was held by the white citizens that "the residence of free negroes among us, is pregnant with evils, evils arising from the influence which the existence of such a class of persons must have upon our slave system," and because "the existence of this class among us, is in the highest degree detrimental to our safety," *id.* at 108, the white citizens ("however painful it may prove to sacrifice feeling to reason, and mistaken compassion to stern policy," *id.* at 110) nevertheless humbly memorialized the legislature to "expel from our territory every free person of color, that we may extinguish at once every gleam of hope which slaves may indulge of ever being free—and that we may proceed to govern them on the only principle that can maintain slavery, the 'principle of fear.'" *Id.* at 110. The memorialists also recommended that free persons of color be prohibited from owning property in order that they would not become rich, buy plantations, and harbor slaves, runaways from their masters. The legislature was asked to prohibit the education of all persons of color, and to prohibit the masters of slaves from teaching them to read and write. *Id.* at 114-15. See Phillips, *The Slave Labor Problem in the Charleston District,* 22 POL. SCI. Q. 416, 432 (1907).

56. The essence of the statute in issue was contained in the third section:

> That if any vessel shall come into any port or harbour of this State, from any

were subject to seizure and confinement in jail during the period the ship was in the harbor.[57] When the ship was readied for sail the captain was required to make restitution for the expense involved in the seizure and detention of his crew. If he failed to pay the expense for the seizure and detention of his crew, the captain was subject to indictment and upon conviction to fine and imprisonment. The free negroes or persons of color who had been seized from the ship's crew were "deemed and taken as absolute slaves," without a trial or a scintilla of due process.

State officials understandably approached, with some hesitation, the complete enforcement of such an extreme statute.[58] In order to over-

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other State or foreign port, having on board any free negroes or persons of color, as cooks, stewards, or mariners, or in any other employment on board of said vessel, such free negroes or persons of color shall be liable to be seized and confined in gaol until said vessel shall clear out and depart from this State; and that when said vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro or free person of color, and to pay the expenses of his detention; and in case of his neglect or refusal so to do, he shall be liable to be indicted, and, on conviction thereof, shall be fined in a sum not less than one thousand dollars and imprisoned not less than two months; and such free negroes or persons of color shall be deemed and taken as absolute slaves, and sold in conformity to the provisions of the Act passed on the twentieth day of December, one thousand eight hundred and twenty, aforesaid.

Act of Dec. 21, 1822, No. 2277, 7 S.C. Stat. 461, (McCord 1840).

57. Justice Johnson made pointed comments about the applicability of the statute to free negroes or persons of color:

> [I]f this state can prohibit Great Britain from employing her colored subjects (and she has them of all colors on the globe), or if at liberty to prohibit the employment of her subjects of the African race, why not prohibit her from using those of Irish or of Scottish nativity? If the color of his skin is to preclude the Lascar or the Sierra Leone seaman, why not the color of his eye or his hair exclude from our ports the inhabitants of her other territories? In fact it amounts to the assertion of the power to exclude the seamen of the territories of Great Britain, or any other nation, altogether. With regard to various friendly nations it amounts to an actual exclusion in its present form. Why may not the shipping of Morocco or of Algiers cover the commerce of France with this country, even at the present crisis? Their seamen are all colored, and even the state of Massachusetts might lately, and may perhaps now, expedite to this port a vessel with her officers black, and her crew composed of Nantucket Indians, known to be among the best seamen in our service. These might all become slaves under this act.

Elkison v. Deliesseline, 8 Fed. Cas. 493, 494-95 (No. 4366) (C.C.D. S.C. 1823).

58. Soon after the act was passed, free colored crewmen were taken from ships standing in the waters of Charleston and held in jail. The captain of one of the American ships petitioned the state courts for a writ of habeas corpus for his crew held in jail on the ground that the act of December, 1820, violated the Constitution of the United States. The state courts upheld the validity of the act and refused the writ. The masters of several American ships memorialized the Congress unsuccessfully for relief. See Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822-1848*, 1 J. SOUTHERN HISTORY 3, 4 (1935).

In January, 1823, the mate and four crewmen were removed from a British ship and confined in jail. This seizure Justice Johnson said was "very remarkable for not having left a single man on board the vessel to guard her in the captain's absence." Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D. S.C. 1823). The captain of the British ship secured release of his crewmen from the Charleston jail with great diffi-

come the official reluctance a private group known as the South Carolina Association was formed in order to effectuate the more vigorous enforce-

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culty and only upon payment of the expenses caused the state by the confinement. Hamer, *supra* at 4, n.6. Justice Johnson referred to the fact that applications for habeas corpus were immediately made to him by the captains of American and British ships "for the protection of the United States authority, in consequence of which I called upon the [U.S.] district attorney for his official services." Elkison v. Deliesseline, *supra.* Johnson instructed the district attorney to bring the matter to the attenion of the state judiciary:

> Whether I possessed the power or not to issue the writ of habeas corpus, it was unquestionable that the state judges could give this summary relief, and I therefore instructed Mr. Gladsden to make application to the state authorities, and to do it in the manner most respectful to them. . . . The application was made to the state authority, and the men were relieved; but the ground of relief not being in its nature general or permanent, Mr. Moody [the British counsul at Charleston] made his representations to Mr. Canning [the British ambassador at Washington] and the northern captains . . . did the same to congress, or to the executive.

Elkison v. Deliesseline, *supra* at 494.

President Monroe referred the question of constitutional structure to the Attorney General of the United States, Mr. William Wirt. The opinion of the Attorney General was handed down on May 8, 1824, some months after Justice Johnson's opinion in *Elkison v. Deliesseline* in August, 1823. While Mr. Wirt made no reference to Justice Johnson's decree he nevertheless followed closely the latter's reasoning and analysis as to the basis for the opinion that § 3 of the South Carolina free negro act was constitutionally null and void, and thus should not be given effect by the national government in its foreign relations:

> By the national constitution, the power of regulating commerce with foreign nations and among the States is given to Congress; and this power is, from its nature, exclusive. This power of regulating commerce, is the power of prescribing the terms on which the intercourse between foreign nations and the United States, and between the several States of the Union, should be carried on. Congress has exercised this power; and among those terms there is no requisition that the vessels which are permitted to enter the ports of the several States shall be navigated wholly by white men. All foreign and domestic vessels complying with the requisitions prescribed by Congress have a right to enter any port of the United States, and a right to remain there, unmolested in vessel or crew, for the peaceful purposes of commerce. No State can interdict a vessel which is about to enter her ports in conformity with the laws of the United States; nor impose any restraint or embarrassment on such vessel, in consequence of her having entered in conformity with those laws. For the regulations of Congress on this subject being both supreme and exclusive, no State can add to them, vary them, obstruct them, or touch the subject in any shape whatever, without the concurrence and sanction of Congress. By the regulations of Congress, vessels navigated by black or colored men may enter any port of the Union for the purposes of commerce, without any molestation or restraint in consequence of having so entered; but the section of the law of South Carolina which we are considering . . . is a regulation of commerce, of a highly penal character, by a State, superadding new restrictions to those which have been imposed by Congress; and declaring, in effect, that what Congress has ordained may be freely and safely done, shall not be done but under heavy penalties.
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> It seems very clear . . . that this section of the law of South Carolina is incompatible with the national constitution and the laws passed under it, and is, therefore, void. All nations in amity with the United States have a right to enter the ports of the Union for the purposes of commerce. . . . And inasmuch as this section of the law of South Carolina is a restriction upon this commerce, it is incompatible with the rights of all nations which are in

ment of the free negro acts.[59] The sheriff accompanied various members of the South Carolina Association in the forcible entry on board trading ships standing in the harbor, including the British ship *Homer,* and seized and incarcerated all members of the crews.

The captain of the British ship *Homer* retained counsel to secure the release of Elkison, a person of color and a member of the crew, who had been forcibly seized on board his ship and confined in jail. According to the shipping articles, Elkison was born in Jamaica and was a free British national residing in Liverpool, England, the ship's sailing port.[60] In order to secure Elkison's release from the state jail under the laws of the United States, counsel applied to Mr. Justice Johnson in the circuit court for a writ of habeas corpus and, in the alternative, for a writ *de homine replegiando.*[61] Counsel alleged that the administrative enforcement of

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amity with the United States.

1 OPS. ATT'Y GEN. 659-61 (1824).

Mr. Wirt stated that in his view the act of South Carolina also was in conflict with the treaty-making power of the national government and with the treaty then in use between England and the United States:

> By the national constitution, the power of making treaties with foreign nations is given to the general government: and the same constitution declares that all the treaties so made shall constitute a part of the law of the land. . . . We have treaties subsisting with various nations, by which the commerce of such nations with the United States is expressly authorized, without any restriction as to the color of the crews by which it shall be carried on. We have such a treaty with Great Britain, as to which nation this question has arisen. This act of South Carolina forbids (or, what is the same thing, punishes) what this treaty authorizes.

Id. at 661. Therefore the act of South Carolina was void "as being against the constitution, treaties, and laws of the United States, and incompatible with the rights of all nations in amity with the United States." *Ibid.*

59. See MORGAN, JUSTICE WILLIAM JOHNSON 197 (1954). Justice Johnson stated in a letter to John Quincy Adams, dated July 3, 1824, that there existed a South Carolina Association that pressed for the enactment of these laws and was providing for their enforcement. House Committee on Commerce, *Free Colored Seamen,* H.R. REP. No. 80, 27th Cong., 3d Sess. 14-15 (1843).

60. Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D. S.C. 1823).

61. The slavish effort of the present day to make remedy as well as substance matters of federal question, and the effort to build a workable legal structure upon the case of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), has tended to becloud an understanding of the sources for the remedial processes in the beginnings of the Supreme Court and the inferior federal courts. Initially, the common law provided much of the source for the courts' lawmaking authority. Following the English example, habeas corpus was both a remedy within the inherent powers of the courts and part of the basic rights of every American. Much of the Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, reflected the common law, recognizing that the courts would turn to the common law for the law of the United States. The "all writs" section of the act provided:

> That all the before mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus,* for the purpose of an enquiry into the cause of commitment.

South Carolina's seamen acts violated Elkison's basic and fundamental rights under the laws of the United States. He argued that the state's abridgment of those basic rights necessitated the formulation of the law of the United States for which the writ of habeas corpus was sought. But according to the Marshall Court's theory of absolute division of powers, constitutional invalidation of the state acts had to precede the judicial enforcement of the national law for preserving personal liberty through the judicial prerogative. The state law was null and void, counsel argued, for it was in direct conflict with powers of the Congress to regulate commerce, and specifically with the commercial agreement treaty of 1815 between the United States and Great Britain.[62] Thus, according to the

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Acts of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82.

At this point, however, the Congress, in order to placate Richard Henry Lee and his colleagues, who embraced the states' rights-independent sovereignty political philosophy, placed some limitations upon the common law sources of law. The Congress enacted a proviso restricting the jurisdiction of the courts in habeas corpus to the review of detention by the national government. The proviso stated: "That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." *Ibid.*

The writ *de homine replegiando* is described in BLACKSTONE'S COMMENTARIES, Bk. 3, ¶¶ 128-29, as one of the legal means "of removing the actual injury of false imprisonment. . . . The writ *de homine replegiando* lies to replevy a man out of prison or out of the custody of any private person (in the same manner that chattels taken in distress may be replevied . . .) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him." Blackstone noted that because the writ *de homine replegiando* was guarded with so many exceptions, especially where the crown was concerned, it became ineffectual for the granting of complete relief for the release of persons illegally detained. But see FITZ-HERBERT'S NATURA BREVIUM ¶¶ 66-68 (1755). In England, the writ *de homine replegiando* had been superceded to a large extent by the various forms of the writ of habeas corpus. But the writ *de homine replegiando* was revived in the United States for use in fugitive slave cases, and in cases in which the writ of habeas corpus was not available for reasons similar to that created by the proviso in § 14 of the Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 82. See 1 KENT'S COMMENTARIES ¶ 404 at 474, n.(d).

62. In support of his demand of the protection of the laws of the United States, counsel for Elkison presented the court with a copy of a letter of June 17, 1823, from Mr. John Quincy Adams, Secretary of State under President Monroe, written to Mr. Stratford Canning, His Majesty's minister to the United States, in answer to Mr. Canning's remonstrance against the South Carolina's seizure of British subjects from British ships. Mr. Adams wrote with undue confidence: "With reference to your letter of the 15th February last, and its enclosure, I have the honor of informing you that immediately after its reception measures were taken by the government of the United States for effecting the removal of the cause of complaint set forth in it, which, it is not doubted, have been successful, and will prevent the recurrence of it in the future." Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D. S.C. 1823). Apparently, the Adams letter was "considered by the counsel [*sic*] as a pledge, which this court is supposed bound to redeem." *Ibid.*

It may be surmised that Mr. Adams had communicated with the South Carolina delegation in the House of Representatives, consisting of Messrs. Joel R. Poinsett (an intimate of Justice Johnson) and James Hamilton, and had received from those gentlemen what Secretary Adams took to be a pledge that the free negro act would not be enforced against foreign ships in the harbor. This had been the attack Justice Johnson

usual mold of adjudication, once the legal authority had been formulated to declare the state law null and void, the case would become an action in habeas corpus to secure the release of a freeman who was confined in the state jail in violation of his basic rights under the laws of the United States.

The South Carolina Association was represented by counsel as the apparent party in interest in defense of the sheriff's authority. Counsel for the Association questioned the court's jurisdictional authority to apply the laws of the United States in an action of habeas corpus initiated by a complainant held in jail by one of the nation's sovereign states. Counsel adopted the basis of the states' rights theories—that the powers of the nation's member states continued to be unlimited under the Constitution to the same extent as under the Articles of Confederation.[63] The powers of the member states collectively embodied the nation's sovereignty.[64] The enforcement of South Carolina's free negro acts was

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had taken in the previous summer because "the act had been passed hastily, and without due consideration." Also Justice Johnson had relied upon Thomas Bennett, the Governor of South Carolina, and Johnson's friend and brother-in-law, to act propitiously in the circumstances. Counsel for the South Carolina Association, Messrs. I. E. Holmes and B. F. Hunt, who also represented what was assumed to be the state's interest in the case, had also been in contact with South Carolina's Representative Hamilton, and they stated that they were authorized to deny that "Mr. Adams was sanctioned by anything that transpired between himself and any member of the state delegation to give such a pledge." Elkison v. Deliesseline, *supra* at 494.

Justice Johnson intimated that he had reliable information as to what had transpired between Mr. Adams and the South Carolina delegation in the Congress but that he did not think it proper to rely upon it. In answer to the Association's counsel, Johnson noted that thereafter the state had not enforced the act and that the state was not represented by the attorney general in the case, intimating that the enforcement of the act had been taken up by the Association. Thus Johnson stated "that pressing the execution of the law at this time is rather a private than a state act." *Ibid.* But Johnson realized that he could not take judicial notice of the letter of Secretary Adams to Mr. Canning, because the letter could not be taken as the kind of an official act of the United States that was subject to judicial enforcement. See also MORGAN, JUSTICE WILLIAM JOHNSON 193 (1954); Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822-1848,* 1 J. SOUTHERN HISTORY 4 (1935).

63. See BAUER, COMMENTARIES ON THE CONSTITUTION, 1790-1860, 168-207 (1952); TUCKER, *View of the Constitution of the United States,* in BLACKSTONE'S COMMENTARIES, Bk. 1, App. D, at 140-377 (Tucker ed. 1803). According to St. George Tucker the Constitution created a federal compact—in effect a treaty, a contract, or alliance between independent, sovereign states who retained their sovereignty and independence. *Id.* at 141.

64. In his law lectures given at the College of William and Mary, Mr. St. George Tucker discussed the supremacy of collective state sovereignty vis-à-vis the national government: "[I]t is . . . a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication; nor in any manner whatsoever but by their own voluntary consent, or by submission to a conqueror." *Id.* at 143. The national government was viewed as an agent of the sovereign states. "The federal government then," Tucker lectured,

> [A]ppears to be the organ through which the united republic communicate with foreign nations, and with each other. Their submission to its operation is voluntary: its councils, its engagements, its authority are theirs, modified, and

authorized in the unlimited police powers reserved in one of the nation's member states. The reserved powers of the member states were those powers not alienated to the national government by the adoption of the Constitution. By authority of its reserved powers, South Carolina had retained complete and unlimited powers over its own internal security.[65]

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united. Its sovereignty is an emanation from theirs, not a flame by which they have been consumed, nor a vortex in which they are swallowed up. Each is still a perfect state, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of its functions, as such, in the most unlimited extent.

Id. at 187.

65. Mr. St. George Tucker saw the Constitution as having created "a confederate, or federal, republic, [which] was probably borrowed from Montesquieu, who treats of it as an expedient for extending the sphere of popular government, and reconciling internal freedom with external security. . . ." TUCKER, *View of the Constitution of the United States,* in BLACKSTONE'S COMMENTARIES, Bk. 1, App. D, at 140 (Tucker ed. 1803). Mr. Tucker believed the Constitution to be only an extension of the Articles of Confederation:

> [I]t was said that the principles of the . . . constitution were to be considered less as absolutely new, than as the expansion of the principles contained in the articles of confederation; that in the latter those principles were so feeble and confined, as to justify all the charges of inefficiency which had been urged against it; that in the new government, as in the old, the general powers are limited, and the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction. This construction has since been fully confirmed by the twelfth article of amendments, [*sic,* the tenth article] which declares, "that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This article was added "to prevent misconstruction or abuse" of the powers granted by the constitution, rather than supposed necessary to explain and secure the rights of the states, or of the people. The powers delegated to the federal government being all positive, and enumerated, according to the rules of construction, whatever is not enumerated is retained; for, *expressum facit tacere tacitum* is a maxim in all cases of construction: it is likewise a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication; nor in any manner whatever but by their voluntary consent, or by submission to a conqueror.

Id. at 142-43.

It was assumed by counsel for the South Carolina Association that the court's law-making functions through the process of adjudication were limited to the powers granted in the Constitution, and that the powers of government in the member states lay "outside the constitution" and thus outside the jurisdictional authority and control of the laws formulated by the court. The notion of the independence of the collective sovereignty of the member states was the foundation of the inferential assumption as to the restrictive limits of the court's law-formulation role. This was an invalid assumption. It was the function of the Congress, and not of the national courts, to make the initial determination of the constitutional powers of the national government, with reference to the needs which called those powers into legislative exercise. Jefferson was only partially right, however, when he said it was the business of each branch of the government to determine its constitutional powers. It was finally within the judicial powers created in the Constitution and by the creation of the Supreme Court—except perhaps as limited by the Congress—for the Court to formulate the law of the United States. The procedure of the common law was the means by which the Court adjudicated cases presented to it for the formulation of legal principles. Since these legal principles were based upon natural reason, which was developed and expounded from the collective wisdom gained from the experience of mankind, the common law contained

This concept of reserved powers had an eleventh amendment effect, *i.e.*, removal of the state from the jurisdiction of a court of the national government in a case based upon habeas corpus.

Mr. Justice Johnson thought the form-of-government arguments of the South Carolina Association to be a complete rejection of the Constitution, "a direct attack upon the sovereignty of the United States" and, if accepted, would lead "to a dissolution of the Union."[66] He summarized the arguments of the Association's counsel as contending: "South Carolina was a sovereign state when she adopted the constitution; . . . South Carolina, therefore, either did not surrender this right, or still possesse[d] the power to resume it, and whether it is necessary, or when it is necessary to resume it, she [was] herself the sovereign judge."[67]

Johnson formulated the law of the United States as constituting a prohibition upon the state's effort to exercise the powers of government that the Constitution had made exclusive in the general government. Recognition of powers in the national government was thought to require the alienation of state powers to the degree that the national powers were to be extended over the subject matter of the case. In order to give adherence to the fundamental legal principles of the basic rights of a free citizen, universally recognized in the remedy of habeas corpus, the court first had to declare:

> . . . [that] the right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right; and this conclusion we arrive at, whether we examine it with reference to the words of the constitution, or the nature of the grant. That this has been the received and universal construction from the first day of the

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the duo-quality of "positive" law and "higher" law. A court created in the tradition of Coke and Blackstone was not limited by the words of the Constitution in the formulation of the law of the United States. The "higher" law quality of legal principles formulated by the Court bound the states as the law of the national government unless and until changed by the Congress.

66. Elkison v. Deliesseline, 8 Fed. Cas. 493, 494 (No. 4366) (C.C.D. S.C. 1823). According to Justice Johnson, Mr. Isaac E. Holmes, counsel for the South Carolina Association, argued that as a sovereign state, South Carolina could not give over its powers of self-preservation to the national government. Mr. Holmes concluded his argument with the declaration that he preferred a dissolution of the Union to the state's surrender of powers which he thought were necessary for self-preservation. This suggestion so shocked Justice Johnson that, as he later described it: "Everyone saw me lay down my pen, raise my eyes from my notes, and fix them on the speaker's face. He still proceeded, and in a style which bore evidence of preparation and study." Quoted in MORGAN, JUSTICE WILLIAM JOHNSON 193-94 (1954), from "Letter signed 'William Johnson,' dated Aug. 20, 1823, in the *Charleston Mercury*, Aug. 21, 1823." See also the reference in Johnson's opinion, Elkison v. Deliesseline, *supra*.

67. Elkison v. Deliesseline, 8 Fed. Cas. 493, 494 (No. 4366) (C.C.D. S.C. 1823).

> organization of the general government is unquestionable; and the right admits not of a question any more than the fact. . . . It is true that . . . [the constitution] contains no prohibition on the states to regulate foreign commerce. Nor was such a prohibition necessary, for the words of the grant sweep away the whole subject, and leave nothing for the states to act upon. Wherever this is the case, there is no prohibitory clause interposed in the constitution. Thus, the states are not prohibited from regulating the value of foreign coins or fixing a standard of weights and measures, for the very words imply a total, unlimited grant. The words in the present case are, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." If congress can regulate commerce, what commerce can it not regulate? And the navigation of ships has always been held, by all nations, to appertain to commercial regulations.[68]

The court's authority had to be grounded in the satisfying formalism that the Constitution, as the fundamental law, required the declaration that the act of the state was null and void.[69] An acceptable jurisdictional authority was thereby established for determining the legality of the exercise of state powers over the life and liberty of a free citizen. This final issue was determined on the basis of general legal principles so universal that no citation was necessary. It was not legal and valid to forfeit the liberty of a free man unless such forfeiture was in compliance with a valid decree under the fundamental law of a free nation. Thus the authority for the court's decision in *Elkison v. Deliesseline* came from sources that were older and more universal, and more fundamental than the Constitution.

"Let it be observed," Johnson wrote in his opinion,

> [T]hat the law is, "if any vessel (not even the vessels of the United States excepted) shall come into any port or harbor of this state" . . . bringing in free colored persons, such persons are to become "absolute slaves," and that, without even a form

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68. *Id.* at 495

69 Professor T. R. Powell has often commented on the formalism in constitutional adjudication; for example:

> I think that what I most object to in many Justices is something that springs from a feeling of judicial duty to try to make out that their conclusions come from the Constitution. True it is that so far as state laws are involved, the task of passing on them in the field of commerce comes from the Constitution. The performance, however, comes mainly from the judges, and on the whole it has created for us a fairly well balanced constitutional federalism.

POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 179 (1956).

> of trial, as I understand the act, they are to be sold. By the next clause the sheriff is vested with absolute power, and expressly enjoined to carry the law into effect, and is to receive the one half of the proceeds of the sale. The object of this law . . . is to prohibit ships coming into this port employing colored seamen, whether citizens or subjects of their own government or not. But if this state can prohibit Great Britain from employing her colored subjects (and she has them of all colors on the globe) . . . why not prohibit her from using those of Irish or of Scottish nativity?[70]

Continuing, Johnson entwined considerations of due process of law with subjects of trade and commerce:

> The offense . . . for which this individual is supposed to forfeit his freedom, is that of coming into this port in the ship Homer, in the capacity of a seaman. . . . The seamen's offense, therefore, is coming into the state in a ship or vessel. . . . Now, according to the laws and treaties of the United States, it was both lawful for this seaman to come into this port, in this vessel, and for the captain to bring him in the capacity of a seaman; and yet these are the very acts for which the state law imposes these heavy penalties. Is there no clashing in this? It is in effect a repeal of the laws of the United States, pro tanto, converting a right into a crime.[71]

No matter what the social and political tremors, the circumstances of the case made it impossible for the court to set the case aside as being outside its authority to formulate national law. Because the court's jurisdictional authority was not understood to have reached directly to the traditions and principles of the common law, it was required to engage in the legerdemain of constitutionalism. The basic and natural rights of free men had to be transformed from the traditional legal principles of private and vested rights into questions of constitutional structure involving the national power to regulate commerce. The constitutional authority would have come more aptly from the general law of habeas corpus, or from the general authority of the due process clause of the fifth amendment, than from the commerce clause.[72] However, in light of the

70. Elkison v. Deliesseline, 8 Fed. Cas. 493, 494 (No. 4366) (C.C.D. S.C. 1823).
71. *Id.* at 495.
72. The national powers under habeas corpus were not made applicable to the states until 1833:

> [E]ither of the justices of the Supreme Court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall

court's limited capacity to enforce its formulations of law against the fierce powers of the member states, the due process clause was not equal to the task of enforcing the national law against the member states. A long time was required, in the evolution of the judicial powers, before the Supreme Court more properly determined that the state had exercised its powers of government in such an extreme manner that its action violated basic rights of personal liberty. The due process and other bill of rights clauses were then used as the more appropriate authority for the formulation of national law in the nationalization of private rights and personal liberty. Before substantive due process and other bill of rights clauses were used, the commerce clause constituted an appropriate source of judicial authority for the enforcement of personal liberty and private rights.

But after such an adjudication under the commerce clause, the principles of basic rights had too limited an application, because those basic rights were limited to circumstances containing elements of commerce, as ships, navigation, and the like. On the other hand, the limitations on state powers which did arise out of the commerce clause—formulated as legal principles—were too broadly drawn and were never capable of application as formulated. South Carolina and other states out of necessity continued to regulate pilots and the navigation of ships in their harbors as well as numerous other aspects of foreign and domestic commerce.[73] Thus, it was more than a little confusing for the court in *Elkison v. Deliesseline* to be first required to determine that state powers were withdrawn from regulating the elements of commerce, before the court was able to exercise its jurisdictional authority over habeas corpus in review of the legality of Elkison's detention in a state jail.

The courts of the United States were also subject to inappropriate legislative limitations in the use of their inherent judicial authority to issue the remedy of habeas corpus. In its early history the Supreme Court and the other federal courts exercised an independent discretion to determine the law of the Constitution as the law of the United States. For jurisdictional authority to formulate the appropriate remedy, the courts

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have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of the law of the United States, or any order, process, or decree, of any judge or court thereof, anything in any act of Congress to the contrary notwithstanding.

Act of March 2, 1833, ch. 52, § 7, 4 Stat. 634. The Bill of Rights was determined not to be applicable to the states in Barran v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

73. Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851).

generally relied on the Judiciary Act of 1789.[74] In practice, some of the justices considered that jurisdictional authority over the appropriate remedy was derived solely from acts of the Congress.[75] In consequence, the independent authority for the formulation of substantive law and the statutory authority for formulating the appropriate remedy required the federal courts to consider their jurisdiction to determine the law of the United States as being separate from their jurisdiction to select the appropriate remedy. In those cases in which a court determined the substantive law without jurisdictional authority over the appropriate remedy it engaged in a process which was only advisory.

Understandably, Mr. Justice Johnson was aggrieved by the end result of his judicial performance in *Elkison*. The British national Elkison had basic rights under the law of the United States, which had been abridged by the South Carolina Association in administering the apparent authority of the state. The remedy to which Elkison was entitled was freedom by removing him from the state jail. But this remedy to which Elkison was entitled was not possible because Congress by the Judiciary Act had withdrawn the judicial authority to remove a prisoner illegally confined in a state jail. The circuit court had been denied its

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74. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. By this act the Supreme Court was composed of a chief justice and five associate justices, § 1; thirteen district courts were created, §§ 2, 3; three circuit courts were created, each to consist of two justices of the Supreme Court and one district judge, §§ 4, 5; the district courts were granted exclusive jurisdiction over minor crimes cognizable under the authority of the United States and over admiralty and maritime, and were also granted concurrent jurisdiction with the states and circuit courts over other matters, §§ 9, 10; the circuit court was granted general diversity and criminal jurisdiction, §§ 11, 12; the Supreme Court was granted exclusive jurisdiction in accord with Article III of the Constitution, appellate jurisdiction from the district and circuit courts, and appellate jurisdiction from the final judgment or decree from a state court, §§ 13, 25. See FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 4-30 (1928).

The Judiciary Act of 1789 was created out of a severe conflict in constitutional theory. The states' rightists attempted to rewrite the Constitution and revert to a confederation in which the judicial power enunciated in Article III would be controlled and administered by the judiciary of the respective states, subject to ultimate review in the Supreme Court. It has been said about the act that it was "the most important and the most satisfactory act ever passed by Congress" and that "the wisdom and forethought with which it was drawn have been the admiration of succeeding generations." Mr. Justice Brown in his address before the American Bar Ass'n, Aug. 20, 1911, and Mr. Justice Miller in United Statesv. Holliday, 70 U.S. (3 Wall.) 407, 414 (1865), *quoted in* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923). However, the criticisms of Attorney General Edmund Randolph in his voluminous report made to the Congress in December of 1790, in which he recommended many radical changes, presented a more accurate picture of the confusion which existed. See 1 AMERICAN STATE PAPERS No. 17 (1817); and the urgent letter of Aug. 19, 1792, by the Jay Court to President Washington, 1 AMERICAN STATE PAPERS No. 32 (1817). See also, 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 610-74 (1953).

75. *Cf.* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 67-69 (1923).

independent authority to use the remedy of habeas corpus after it had determined the illegality of the imprisonment and other denial of liberty.[76] By denying the national judiciary its prerequisite authority to issue the writ of habeas corpus, the Congress had in effect authorized the states to violate the laws of the United States formulated from the authority of the Constitution.

Mr. Justice Johnson was unduly helpless on the question of the remedy, as compared with the breadth of his exercised prerogative in determining the substantive law. Substantively the court had determined that the state act was null and void and that Elkison's deprivation of liberty was in violation of the law of the United States. "That a party should have a right to his liberty, and no remedy to obtain it, is an obvious mockery," Johnson wrote, "but it is still greater to suppose that he can be altogether precluded from his constitutional remedy to recover his freedom."[77] The prisoner's predicament he described in light of his own helplessness: "By giving it the form of a state prosecution the prisoner is to be deprived of the summary interference of the United States authority. . . ."[78] These circumstances made it "impossible to conceal the hardships" of the prisoner's case or to "deny his claim to some remedy."[79] Notwithstanding, Johnson justified his refusal to grant the prisoner's sole remedy under the law of the United States with the face-saving comment: "As far as congress can extend and shall extend the power to afford relief by this writ, I trust I shall never be found backward to grant it. At present I am satisfied that I am not vested with that power in this case."[80]

Counsel for Elkison presented Johnson with an escape from the difficulty the court had created for itself. Counsel contended that the act of the Congress which denied the court jurisdiction over habeas corpus was void. The proviso of section fourteen of the Judiciary Act of 1789—"that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States"[81]—was said to conflict with the prohibition in the Constitution that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public

76. Elkison v. Deliesseline, 8 Fed. Cas. 493, 497 (No. 4366) (C.C.D. S.C. 1823).
77. *Id.* at 496.
78. *Ibid.*
79. *Ibid.*
80. *Id.* at 497.
81. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

safety may require it."[82] The constitutional provision contemplated a general application of habeas corpus, not a limited, restrictive application resulting in a substantial suspension of the writ.

Johnson, however, did not consider the point. First, he assumed that the constitutional authority over judicial remedies was to be found in the powers delegated to the Congress. To Johnson this meant that a court of the United States was restricted to the Judiciary Act and to other acts of the Congress for its authority to select and use an appropriate remedy to enforce its formulations of substantive law. Johnson did not comprehend that the Congress was able to deny basic and fundamental rights under the language and spirit of the Constitution in enactments having to do with legal remedies.[83] A general practice of looking to an act of the Congress for the selection of an appropriate judicial remedy did not mean to Johnson that the court was thereby restricted in its jurisdictional authority. The practice could not result in a denial of the constitutional judicial prerogative to enforce basic and fundamental rights.

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82. U.S. CONST. art. I, § 9. Habeas corpus was considered as basic and fundamental as trial by jury, and so commonly accepted that there was no necessity of affirmation in the Bill of Rights. Professor Chafee has written about the historic writ as the most important human right in the Constitution:

> The most important human rights provision in the Constitution, as I look at it, is in Article I, section 9. . . . Perhaps Dr. Johnson went too far in telling Boswell, "The Habeas Corpus is the single advantage our government has over that of other countries." [Boswell's Life of Johnson, narrative for Sept. 1769]. Still, such great liberties as worship and speech will go on somehow, despite laws, but not the liberty of person. Censorship can be evaded; prosecutions against ideas may break down; a prison is *there*. Only habeas corpus can penetrate it. When imprisonment is possible without explanation or redress, every form of liberty is impaired. A man in jail cannot go to church or discuss or publish or assemble or enjoy property or go to the polls.

Chafee, *The Most Important Right in the Constitution*, 32 B.U.L. REV. 143 (1952). See also 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 625 (1953), for the view that in terms of constitutional theory and structure, Article I, § 9 contemplated the existing common law as the national law on the subject. The provision recognized the writ as a basic right of national law, not to be suspended—even partially—except "in cases of rebellion or invasion" and only then "when the public safety may require it." The restrictive proviso of § 14 of the Judiciary Act of 1789, withdrawing federal jurisdiction when the prisoner was held by state courts, was in violation of the Constitution. Section 14 was enacted under the erroneous principle, later enunciated in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1832), that the Supreme Court's lawmaking functions under the Bill of Rights were not nationalized to the extent of enforcing limitations upon the states.

83. Johnson's difficulties with this problem exemplified the existing confusion over the characteristics and role of the independent judiciary, and over the relationship of the judiciary to the powers of the Congress to create the courts and to provide for judicial enforcement of the policies of government. Also involved were the various conflicting theories about the character of the national government created under the written Constitution. For example, Justice Johnson's dissent in *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101-07 (1807), was posited upon the surprising ground that § 14 of the Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 81, which provided that "All the before-mentioned courts

Similarly, Mr. Justice Johnson unduly restricted the authority of the court to review the power of the Congress to suspend the remedy of habeas corpus. In the Constitution Congress was recognized as having the power to suspend the remedy "when . . . the public safety may require it."[84] But this did not mean that an effort by the Congress to suspend the remedy of habeas corpus was not subject to judicial review in

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shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," was not sufficient to authorize the Supreme Court to exercise its jurisdiction in habeas corpus to review the legality of the commitment of Bollman and Swartwout for high treason without the allowance of bail. Section 14 did not satisfy Johnson's restrictive standard that the court possessed "no other jurisdiction or power than what is given it by the constitution and laws of the United States, or is necessarily incident to the exercise of those expressly given." *Id.* at 102. The independence of the judiciary was not of sufficient concern to Justice Johnson.

However, Johnson was soon to face the injustice of so hobbling the independence of the national courts to the Congress. In December, 1807, the Jefferson administration secured passage of the historic Embargo Act of Dec. 22, 1807, ch. 5, 2 Stat. 451, and in the following year the Congress authorized port collectors "to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinions the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon." Act of April 25, 1808, ch. 66, § 11, 2 Stat. 501. President Jefferson, in his usual exuberance in matters that pertained to the powers of the presidency, issued a directive through the Department of the Treasury that ships were to be embargoed when loaded by cargoes "for a place where they cannot be wanted for consumption. . . ." Directive quoted in MORGAN, JUSTICE WILLIAM JOHNSON 58 (1954).

Soon thereafter Justice Johnson entered a decree in a petition for a writ of mandamus directing the collector of the port at Charleston to grant clearance to vessels loaded with rice and cotton where there could be no intentions to evade the Embargo Act, an effective invalidation of the President's order. Justice Johnson wrote that: "The officers of our government, from the highest to the lowest, are equally subject to legal restraint; and it is confidently believed that all of them feel themselves equally incapable, as well from law as from inclination, to attempt an unsanctioned encroachment upon individual liberty." Gilchrist v. Collector of Charleston, 10 Fed. Cas. 355, 356, (No. 5420) (C.C.D. S.C. 1808).

In a letter to Justice Johnson, President Jefferson's Attorney General, Mr. Caesar A. Rodney, attacked the exercise of general discretion by the circuit court in the use of mandamus without an explicit congressional authority to use the remedy in the particular statutory circumstances. *Id.* at 357-59. In his reply, Justice Johnson wavered on the question of jurisdiction, stating that:

> [I]t is very possible that the court may have erred in their decision. . . . Though the laws had not vested the power, the submission of the officers of government would, at least, excuse the act of the court. There never existed a stronger case for calling for the powers of a court; and whatever censure the executive sanction may draw upon us, nothing can deprive us of the consciousness of having acted with firmness, impartiality of an honest intention to discharge our duty.

Id. at 366. As Johnson noted, if it were true that the court were lacking in jurisdiction to issue the writ, this did not validate the President's order which was not authorized by the statute. Doubtless, high motives did not satisfy the President; nevertheless he followed the suggestion of Justice Johnson and submitted to a statutory amendment which provided for such action by the President. Act of Jan. 9, 1809, ch. 5, § 10, 2 Stat. 509.

84. U.S. CONST. art. I, § 9.

the process of enforcement of basic and fundamental rights. The privilege of habeas corpus constituted a fundamental substantive right, in addition to its being a judicial remedy to determine the legality of a denial of one's liberty.[85] Therefore, Johnson's assumption that exclusive and nonreviewable authority to suspend the remedy of habeas corpus lay in the Congress was surprising indeed, in the face of the proviso of section fourteen which constituted an extreme invasion of the legitimate judicial authority of the courts of the United States, and in this case an abridgment of basic rights of personal liberty.

The proviso of section fourteen of the Judiciary Act, which denied the use of the remedy of habeas corpus in the courts of the United States to review the legality under national law of detention in a state jail, did not conflict with basic rights in normal circumstances. The validity under the national law of detention in a state jail was generally reviewable under section twenty-five of the Judiciary Act.[86] However, *Elkison v. Deliesseline* presented special circumstances in this regard. The sheriff's execution of South Carolina's free negro acts by seizure, detention, and sale into slavery was not subject to review in the state courts. Therefore section twenty-five of the Judiciary Act was not available to bring the case to the Supreme Court for review of the legality of Elkison's detention under the laws of the United States. Johnson did not comprehend the difference between a total invalidity of the proviso in section fourteen and a partial invalidation according to the particular circumstances. The court should have decreed a partial invalidation, when withdrawal of the jurisdiction in the courts of the United States to grant the remedy of habeas corpus constituted an actual suspension of the remedy and a denial of fundamental rights.

It was a sad ending to a great judicial performance. It was a great judicial performance notwithstanding the confused state of the sources for the formulation of national law. The court's jurisdictional authority to enforce the basic rights of a free citizen had to be found in the legislative powers of the Congress to regulate commerce and had to be stated

85. See *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); *Ex parte* Burford, 7 U.S. (3 Cranch) 447 (1806); Chaffee, *The Most Important Right in the Constitution*, 32 B.U.L. REV. 143 (1952).

86. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85-86:

> [A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision could be had . . . where is drawn in question the validity of a treaty or a statute of, or an authority exercised under any State, on ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States on writ of error. . . .

in the legal formalism of an absolute division of powers between the national and state governments. Notwithstanding such diverting complexities of a written constitution, the substantive law of the United States was formulated to secure the fundamental liberty of a free person, against abridgment by one of the nation's member states.

IV. Livingston v. Van Ingen

Robert Fulton's promotion of the steamboat brought to the American community more than a swift and convenient mode of transportation. That swift and convenient mode of transportation soon out-distanced the legal system operating under the constitutional authority of a member state. The steamboat did not respect political boundaries, and private rights in the use and enjoyment of the new technology could hardly be restricted to the laws of the various states. The exciting social implications in the freedom of movement and association among the people of the different states and foreign countries also demanded recognition. These circumstances made it inevitable that the Supreme Court would be called upon to formulate national law as the judicial authority for enforcement of private rights in the use and enjoyment of the steamboat.[87]

The new nation of member states needed for its preservation a high court as a functioning authority in the national government. But in the historic setting under review, establishing the Supreme Court required a long process of evolution, a conditioning process for the experiment in representative government. The Marshall Court can be judged as having made a significant beginning, when it is recognized that its legal formulations were made to overcome the fierce obstacles imposed not only by the state of mind which appeared to classify the nation's member states as independent sovereignties, but also by the political and administrative strength of the state governments vis-à-vis a weak national government. The legal formulations which the Marshall Court established under the apparent authority of the commerce clause were not in a cardinal sense principles of law. They were not moral-ethical guides with recognizable standings of universality. They were legal formulations for guiding power politics, and to a lesser extent perhaps for preserving the independence of the judiciary. They were devised for a nation whose government at the apex was notably too weak and incapacitated for its legislative and executive regulations to bind the much stronger governments in its member states.

The industrial revolution came very late to America, but it came with such fervor and transforming speed that it nearly overwhelmed the

87. See 4 Beveridge, The Life of John Marshall 397-401 (1919).

existing political and social institutions. If the steam engine did not remake America's social history, it thrust forward its nationalizing processes at breakneck speed. The steam engine revolutionized transportation within the United States; moving down the great rivers from New York to New Orleans and on tracks laid state-to-state it was no respecter of the artificial state boundaries. Within a short span of time it was beyond the capacity of the individual state to structuralize the manifold problems of the new technology and the varied interest which it created into a workable system of law. These had to be reviewed in the course of the adjudication of private rights created by the new technology, first under state law and then under the laws of the United States.

Some years prior to the successful operation of the steamboat the New York legislature awarded an exclusive franchise to certain of its promoters. The franchise granted a complete monopoly over navigation by fire or steam on all public waters within the boundaries of the state.[88] Only propulsion by the winds, which soon had no commercial significance, remained outside the state franchise. The promoters granted this exclusive franchise were Robert R. Livingston, the famed colonial patriot and statesman,[89] and Robert Fulton, who promoted himself as an in-

88. The first such act of New York was granted to John Fitch by an act passed on the 19th of March, 1787. 2 N.Y. Laws 472 (1886). Exclusive grants to John Fitch in steamboat navigation were also enacted by the legislatures of Pennsylvania, March 28, 1787; New Jersey, March 18, 1786; Delaware, February 3, 1787; and Virginia, November 7, 1787. The various acts were substantially in the language of the Pennsylvania statute. See WESTCOTT, LIFE OF JOHN FITCH 151, 173-76 (1857).

89. Robert R. Livingston was the scion of one of New York's most distinguished families. Educated at King's College, of the class of 1765, he began his professional career in 1779 in partnership with John Jay as "one of the ablest of American lawyers," according to Jefferson. He was active in the independence movement, and served as a delegate from New York in the Continental Congress during 1775-1776 and 1779-1781, and in the Congress of the United States during 1784-1785. With John Adams and Thomas Jefferson he served on the special committee appointed to draft the Declaration of Independence, though he neither voted for nor signed the Declaration. In 1781, when the Congress established a department of foreign affairs, Livingston was made the secretary of that department; from this office he directed the negotiations for the Treaty of Peace. He resigned from that office in June, 1783, because of the inadequacy of the salary, after having submitted his resignation in the preceding December.

The greatest accomplishment of his distinguished career was his participation in the Louisiana Purchase on May 2, 1803. According to Henry Adams, the Louisiana Purchase was "the greatest diplomatic success recorded in American history." In 1804 Livingston retired to his estate, Clermont, to begin his endeavors with Robert Fulton in promoting their steamboat franchise. Prior to his retirement from public life in 1804, Livingston also had been active in the public affairs of New York; he served as the state's first Chancellor from 1777 to 1801, though he did not publish his decisions and did not distinguish himself in that office; he was influential in the New York ratifying convention in support of the Constitution of the United States; he later became one of the state's leading Republicans, supporting Aaron Burr for the Senate and opposing Hamilton's financial plans and Jay's treaty with Great Britain; and in 1795 he ran for Governor of New York but was defeated by John Jay. From 1804 until his death in February, 1813, Livingston was active in promoting the Livingston and Fulton

ventor of the steamboat.[90] In consequence, any boat propelled by fire or steam, whether it entered the New York waters from Boston, Mobile or Liverpool, or coastwise from New Jersey, was prohibited from navigating the public waters within New York. The Connecticut and New Jersey legislatures were stirred to enact retaliatory measures, providing for the seizure and forfeiture of boats which held an exclusive New York franchise and which navigated in their public waters.[91]

A highlight of the extensive New York litigations brought to protect the exclusive franchise was the historic case involving the Livingston and Fulton franchise against the Van Ingen interests.[92] The case is significant in constitutional history because of the initiatory nature and the breadth of the legal issues presented for determination. The exclusive franchise raised broad politico-economic issues which were made

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steamboat franchise, both in litigation and in pamphlet warfare. His political influence helped him to secure the exclusive franchise in 1798, though he was in no position to satisfy the conditions of the grant. While minister to France during 1801-1804 he became associated with Robert Fulton in steamboat construction and later in the franchise. See, *e.g.*, Hayes, *Robert R. Livingston,* 11 DICTIONARY OF AMERICAN BIOGRAPHY 320 (1943).

90. Robert Fulton was a resident of Pennsylvania. His professional interests were numerous; in the beginning he made his livelihood by painting, moving from Pennsylvania to England for that purpose. Later his interests turned to civil engineering and inventing. Soon he became interested in the steam engine for boat propulsion; he also constructed a mechanical device to raise and lower canal boats, a machine for sawing marble, a dredging machine with a power shovel. Then he went to France where he engaged in submarine and torpedo construction. In October, 1802, Fulton met the United States minister to France, the Honorable Robert R. Livingston, and entered into a legal agreement with Livingston to construct a steamboat of twenty tons or more. Early in 1803, Fulton constructed a steamboat which broke up and sank, but later in 1803 a steamboat constructed by Fulton successfully navigated the Seine River.

For the purpose of complying with the New York statute Fulton came to the United States late in 1806 to construct a steamboat which would navigate the Hudson. The delay was caused by the time consumed in constructing a steam engine in England. On August 17, 1807, the steamboat, the *Clermont,* was completed. It was 133 feet long and was powered by a Watt steam engine installed in the forward part of the boat with the boiler adjacent thereto, and carried two side paddle wheels, fifteen feet in diameter, which propelled the boat. The memorable first voyage between New York City and Albany took five days for the round trip, but the underway time was actually only approximately sixty-two hours. The average speed for the full run was close to five knots.

Fulton was a prophet and an economic politician, and a leading participant in the revolution wrought by the steamboat but he was not its inventor. He directed the attaching of a Watt engine, built in England, to a boat constructed by one Charles Brown, a New York shipbuilder. In all, at least seventeen steamboats were constructed under Fulton's direction. See DICKINSON, ROBERT FULTON—ENGINEER AND ARTIST—HIS LIFE AND WORKS (1913); Mitman, *Robert Fulton,* in 7 DICTIONARY OF AMERICAN BIOGRAPHY 68 (1931); SUTCLIFFE, ROBERT FULTON AND THE CLERMONT (1909).

91. Conn. Laws, May Sess. 1822, ch. 28; Act of Jan. 25, 1811, N.J. Laws 1811, 298.

92. Livingston v. Van Ingen, 9 Johns R. 507 (N.Y. Ct. Err. 1812). See a resumé and delineation of the *Livingston v. Van Ingen* case in 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 231-34 (1953); and in HORTON, JAMES KENT: A STUDY IN CONSERVATISM 166-76 (1939).

a part of the legal issues. These broader policy questions moved the New York Court of Chancellery to turn to the legal history of other societies for the appropriate legal principles establishing the law of the case. The purpose of the litigation was to keep all steamboats off the public waters of New York except those navigating under the exclusive franchise; the bill petitioned that the Van Ingen interests be enjoined from using "a steamboat called the Hope, in the navigation of the Hudson River," in contravention of the rights of Livingston and Fulton under the exclusive franchise.[93] A detailed resumé of the background of the Livingston and Fulton claims was given in the bill.[94]

The earliest statute granting the exclusive right to navigate steamboats on New York waters was enacted March 19, 1787, and was titled, *An Act for Granting and Securing to John Fitch, the sole right and advantage of Making and Employing, for a limited time, the Steamboat by him lately invented.*[95] Mr. Fitch, who had received a similar grant in Pennsylvania, represented to the legislature of New York that he had "constructed an easy and expeditious method of impelling boats through the water by the force of steam."[96] In order to promote and encourage so useful an improvement the legislature granted to Mr. Fitch, "his heirs, executors, administrators and assigns . . . the sole and exclusive right and privilege of constructing, making, using, employing, and navigating, all and every species or kinds of boats or water craft, which may be urged or impelled through the water by the force of fire or steam, in all creeks, rivers, bays, and waters whatsoever, within the territory and jurisdiction of this State, for and during the full . . . term of fourteen years. . . ."[97] Anyone who transgressed these exclusive privileges forfeited one hundred pounds for each offense, which was against "the tenor, true intent and meaning" of the statute, and forfeited the offending boat with the steam engine and all its appurtenances. And the subject of both forfeitures inured to the private benefit of the holders of the legislative franchise.[98]

Fitch was not a resident of New York, however, but of Bucks County, Pennsylvania, and he lacked the organization and means to develop or defend his rights in the New York franchise.[99] The colonial patriot, Robert

93. Livingston v. Van Ingen, 9 Johns. R. 507, 514-15 (N.Y. Ct. Err. 1812).
94. *Id.* at 507-14.
95. 2 N.Y. Laws 472 (1886).
96. *Ibid.*
97. *Ibid.*
98. *Ibid.*
99. John Fitch was a recognized inventor and builder of steamboats. He had been granted letters patent for the steamboat by the United States on August 26, 1791, and by the government of France in the same year. He devoted the last thirteen years

R. Livingston, subsequently represented to the New York legislature that he had bestowed much time and attention on the exciting subject of applying the force of fire and steam to navigation and after a variety of experiments had conceived a mode of applying the steam engine to navigation "on new and advantageous principles." He also represented that he was unwilling to run the risk of making a practical experiment of his plans at great personal expense until he was encouraged to do so by an exclusive franchise secured to him by law. The New York legislature, on March 27, 1798, repealed the act of March 19, 1787, thereby confiscating the exclusive grant made to John Fitch. The sole and exclusive privileges for navigation by fire and steam on all the public waters within the territorial jurisdiction of New York were then transferred to Robert R. Livingston.[100] By subsequent statutes the exclusive rights to steamboat navigation were extended to the joint enterprise of Robert R. Livingston and Robert Fulton for a term of twenty years, provided within two years they had propelled a boat of twenty tons capacity through the waters of the Hudson by steam at four miles per hour.[101] It was in August, 1807, when the *Clermont* steamed up the Hudson from New

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of his life, 1785-1798, to the building of steamboats. Previously he had been, among other things, in the brass and silversmith business and a surveyor and map-maker of the lands in the Northwest Territory. Fitch had secured exclusive franchises for steamboat navigation from New Jersey in 1786, and from Pennsylvania, New York, Delaware and Virginia in 1787. Fitch launched his first steamboat, a 45-foot boat, on August 22, 1787, on the Delaware River at Philadelphia. In July, 1788, he launched a 60-footer which was propelled by a steam paddle wheel. With this boat he carried as many as 30 passengers between Philadelphia and Burlington, New Jersey. He built an even larger boat which was put in regular service on the Delaware River. It was this third and larger boat, launched in 1790, on which the letters of patent were granted. However, Fitch's financial backers withdrew from these successful ventures, leaving Fitch stranded in bankruptcy. He had failed, where Robert Fulton later succeeded in the promotion of his contributions. Fitch failed to conceive of the economic costs and returns, and of the promotional necessities, of the steamboat. The public was then apathetic about the steamboat. Thus Fitch died in bankruptcy, after having initiated the new technology of applying the steam engine to power mechanisms in the navigation of public waters. See Mitman, *John Fitch*, in 6 DICTIONARY OF AMERICAN BIOGRAPHY 425 (1943); WESTCOTT, LIFE OF JOHN FITCH (1857).

100. Act of March 27, 1798, 4 N.Y. Laws 215 (1887). The statute noted that John Fitch had made no attempt to execute his plans in the ten years since he had been granted his franchise, and then revoked the franchise. Privileges of a similar nature were granted to Livingston for a term of twenty years, with a further important proviso:

> *Provided nevertheless* that the said Robert shall within twelve months from the passing of this act give such proof as shall satisfy the governor, the lieutenant governor and the surveyor general of this State, or a majority of them of his having built a boat of at least twenty ton's capacity, which is propelled by steam, and the means of whose progress through the water with and against the ordinary current of Hudson's river taken together shall not be less than four miles an hour, and shall at no time omit for the space of one year to have a boat of such construction plying between the cities of New York and Albany.

101. Act of April 5, 1803, 3 N.Y. Laws 323 (Webster 1802).

York to Albany and returned.[102] The legislature's extreme pleasure at this happy event was reflected in the act of April 11, 1808, which extended the exclusive "grant or contract with the state" for an additional five years.[103]

In a learned and most interesting opinion, Chancellor John Lansing[104] denied the prayer by the Livingston and Fulton interests for an injunction to keep all steamboats not licensed by the franchise off the navigable waters of New York.[105] The main authority for the Chancel-

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102. Livingston and Fulton had been granted another two-year extension in the act passed April 6, 1807, 5 N.Y. Laws 213 (Webster & Skinner 1807).

103. Act of April 11, 1808, 5 N.Y. Laws 407-08 (Webster & Skinner 1807) entitled *An Act for the Further Encouragement of Steam-Boats, on the Waters of this State, and for Other Purposes.* The act said in part:

> *Be it enacted by the People of the State of New York, represented in Senate and Assembly,* That whenever Robert R. Livingston and Robert Fulton, and such persons as they may associate with them, shall establish one or more steam-boats or vessels, other than that already established, they shall, for each and every such additional boat be entitled to five years prolongation of their grant or contract with this state: *Provided nevertheless,* That the whole term of their exclusive privileges shall not exceed thirty years, after the passage of this act.

104. Chancellor Lansing had succeeded Robert R. Livingston on the New York Court of Chancery in 1801, and was himself succeeded by James Kent as Chancellor in 1814. See HICKS, MEN AND BOOKS FAMOUS IN THE LAW 146 (1921); WARREN, HISTORY OF THE AMERICAN BAR 293, 298 (1911). Lansing was also judge of the state supreme court, serving from 1790 to 1801 when he was appointed Chancellor. Lansing's biography is highlighted by his withdrawal from the Constitutional Convention in Philadelphia in 1787. On March 6, 1787, Lansing was chosen with Robert Yates and Alexander Hamilton as the New York delegates to the Constitutional Convention. He withdrew with Yates from the convention on July 10, 1787, because the convention had exceeded its instructions from the Congress of the United States; it was in the process of drafting a new constitution, and Lansing interpreted the instructions given the convention to be limited to that of amending the Articles of Confederation. Later, as an elected member of the New York ratifying convention, he vigorously opposed ratifying the new Constitution. See Cushman, *John Lansing,* in 10 DICTIONARY OF AMERICAN BIOGRAPHY 608 (1933). Lansing moved that New York's ratification of the Constitution be conditional with the right to withdraw from the Union unless the amendments proposed by the convention be submitted immediately for action by the Congress, which motion was defeated. Lansing spoke the thoughts of Patrick Henry of Virginia and of Governor Clinton of his own state, when he expressed the opinion "that a consolidated government, partaking in a great degree of republican principles, and which had in object the control of the inhabitants of the extensive territory of the United States, by its role operations could not preserve the essential rights and liberties of the people." 2 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 220 (1836).

105. The first order of the Chancellor was to refuse to grant the injunction on the *ex parte* application of the complainants. The Chancellor directed the issuance of a rule to the respondents to show cause why a permanent injunction should not issue. In consequence of the Chancellor's refusal to enter at least a temporary injunction *ex parte,* the legislature passed the Act of April 9, 1811, *An ACT for the more effectual Enforcement of the Provisions contained in an Act, entitled "An Act for the further Encouragement of Steam-Boats on the Waters of this State, and for other Purposes."* 6 N.Y. Laws 286 (Websters & Skinner 1812). The first section of the act made the remedy of forfeiture "the same remedy, both in law and equity, for the recovery of the said boat and engine or boats and engines, tackle and apparel, as if the same had been tortiously and wrongfully taken out of their possession." Section 2 of the act authorized and

lor's determination not to enforce the private rights of the franchise by equitable remedies was the Institutes of Justinian. Emperor Justinian had acknowledged in his ancient code of the sixth century that the common right to the individual enjoyment of air and water was paramount to his authority—though his authority was of divine origin—because of its bestowal by the hand of nature. Chancellor Lansing considered that a rule of law formulated from such a noted and universal source was "calculated to impress the mind with its sincerity and truth, and that it was dictated by the general sense of mankind."[106] These general principles of law, which had been formulated in order to preserve the sea and its appurtenances for the common usage without sovereign restrictions, had been "uniformly . . . extended to rivers in which the tide ebbs and flows, as arms of the sea,"[107] though the Chancellor admitted that rivers which flow "through distinct sovereignties" might not be subject to the general principles through which the law of nations was given as a source for such restrictions on the powers of sovereignty.[108]

These legal formulations the Chancellor justified by heaping praise upon the source from whence they were derived: It was "from the great antiquity of its sources" that the law of Rome had been infused with "the

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required injunction against any further navigating and against removal of the violating steamboats from the jurisdiction of the state. Such injunctions were to issue against the captain. The act provided further:

> That nothing in this act shall be deemed or construed to extend or apply to the two boats or vessels commonly called steam-boats, belonging to Hamilton Boyd, Isaiah Townsend, Robert R. Henry and their associates, or to the captain, mariners and others employed in navigating same, which boats or vessels were lately launched at the city of Albany, nor to the steam-boat which during the last summer plied on Lake Champlain, and is said to belong to James Winants and his associates, or to the captain, mariners or others employed in navigating the same, but in regard to the said three boats or vessels the said Robert R. Livingston and Robert Fulton, and their associates or assigns, shall have and enjoy all the remedies heretofore provided in and by or resulting from any former law or laws of this state, and the relative rights and remedies of the respective parties in relation to the three boats or vessels above mentioned, shall be and remain as if this act had not been passed.

106. Livingston v. Van Ingen, 9 Johns. R. 507, 517 (N.Y. Ct. Err. 1812).

107. *Id.* at 518.

108. *Ibid.* Chancellor Lansing stated, somewhat equivocally, the application of the principles of common usage to rivers flowing within a nation-state:

> The general principles applied to the sea have as uniformly been extended to rivers in which the tide ebbs and flows, as arms of the sea. Those rivers flowing through territories which bind and confine them contract their public use to the people of the states bordering on them; which, in practice, has been considered as a national occupancy, vesting in the people of those states the same enjoyment as common to all, on a more contracted scale; but whether, when flowing through distinct sovereignties, they are at all susceptible of exclusive national appropriation, so as to exclude the nation most remote from the sea from a free access to it, has been a question of animated discussion both here and in Europe.

experience, wisdom, and science of successive ages"; and "from the sound maxims of justice and jurisprudence it contained, from the able and learned jurists intrusted with its compilation, as well as its intrinsic worth, it has been deservedly held in reverence by all the civilized world. . . ."[109] And the Chancellor looked to the authorities of the common law that had recognized the Roman as the source for legal principles. From a reading of Bracton and Sir Matthew Hale, he deduced that the common law had conformed to the principles and maxims of the Institutes of Justinian that placed all navigable streams among "those things which are given to mankind . . . by the law of nature."[110] The common law, like the Roman, had "consecrated the navigable rivers to the common use of all, established a common right incapable of alienation or restraint, and shielded the public, in the exercise of that right, 'from every species of private appropriation.' "[111] In the common law, private rights had been given their highest recognition and, in its principles, the *jus privatum*—instead of the *jus publicum*—was drawn from those immutable laws of nature. Thus, common reason became the basis of the formulation of private rights as legal limitations upon the powers of the sovereign and the state. Because of the sovereign's inherent powers of conserving the public estate—indeed, he was the "Lord Protector"—certain aspects of the *jus publicum,* like air and public waters, were as noninvadeable as they were inalienable by the state's highest authority.[112]

In the Chancellor's opinion, the legislative grant to Livingston and Fulton invaded those communal natural rights which were not susceptible to the creation of private rights by franchise between the state and the citizen. In his final justification, the Chancellor became even more creative in his efforts to make more weighty the great principles of law derived from the laws of nature. Those great principles were now embedded in a new authority that was an equally fundamental source. Subjects of the *jus publicum,* like the right of navigation on the nation's public waters, were included among those fundamental privileges and immunities of the citizens of the several states secured in the Constitution against invasion or sequestration by a member state.[113] And the learned

109. Livingston v. Van Ingen, 9 Johns. R. 507, 517 (N.Y. Ct. Err. 1812).
110. *Id.* at 517-18.
111. *Id.* at 520.
112. *Id.* at 518-20.
113. Chancellor Lansing in effect says that the grant in this case, which partakes of the nature of a contract between the state and the holders of the franchise, was "carved out of the *jus publicum* of the citizens of the United States." *Id.* at 521. To limit the privileges and immunities of the fourth article of the Constitution to the prevention of discrimination by one state against citizens of another state would have had

Chancellor ended with a final notation: A possibility existed that the legislative grant invaded the authority of the national Congress to regulate commerce.[114]

In view of these many difficulties, the Chancellor concluded that he ought not to grant an injunction which would exclude the non-enfranchised steamboats from plying the public waters of the state. Such an injunction would have conflicted with those most fundamental of all legal principles—those formulated from the laws of nature. No legislature could have designed such a consequence.[115]

The ultimate determination of *Livingston v. Van Ingen,* as to the conflict between the private rights in the exclusive franchise and the common rights in the use of the public waters, was made in the New York Court of Errors on legal issues drawn solely from the Constitution of the United States. Counsel for the Van Ingen interests asserted that the legislative grant made to the Livingston and Fulton franchise was void under the Constitution because the subject of the grant was includible in Congress' powers to grant exclusive rights of patent to inventors and to regulate commerce.[116] Counsel's legal formulations were drawn out of the assumption that the state, in creating exclusive rights in steamboat navigation, had exercised powers which by implication had been withdrawn from the states by the grant of legislative powers in the Constitution. Number thirty-two of *The Federalist* was relied on as the sole

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the effect of interpreting the Constitution "as to give rights to the citizens of all states superior to the rights of [the citizens of] that state in which they are to be exercised." *Ibid.* In the Chancellor's pen an abridgment of the common rights of all persons enforcible within the legal principles of the Constitution was equated to an abridgement of private rights of a single person. Thus the great Roman principles transmitted through the Institutes of Justinian had moved through the common law to form the basis for the law of the American Constitution, so long as these principles could be formulated from the authority of a particular provision of the Constitution, in this instance the privileges and immunities clause.

114. In the beginning of his opinion Chancellor Lansing reflected:

> There are circumstances in this case which would have induced me to have availed myself of the aid of one of the judges of the Supreme Court, to decide on the important and novel questions which were presented, if the forms of the court and the established modes of proceeding, had admitted of it; but that resort being beyond my reach, the duty imposed prescribed my line of conduct.

Id. at 515.

115. *Id.* at 522.

116. Counsel for Van Ingen in opposition to the franchise were John Wells, John V. Henry, and Abraham Van Vechten, lawyers with state and national reputations. See WARREN, A HISTORY OF THE AMERICAN BAR 297-98, 303, 304 (1911). Warren described Wells in the following: "Wells convinced juries and judges by his unrivalled lucidity and the irresistible power of his logic. He was born in 1770, a graduate of Princeton in 1788, and admitted to practise as counsellor in 1795. Upon Hamilton's death, in 1804, he succeeded largely to his enormous business among the merchants of New York." *Id.* at 303. Van Vechten had been termed "the father of the New York Bar," being the first lawyer admitted to practice under the New York Constitution.

authority for these abstract legal propositions. On this particular occasion, Mr. Hamilton, the "illustrious statesman and distinguished lawyer," was credited with being the author.[117]

The Federalist was exalted for the purpose of demonstrating that the subjects of the patent and commerce clauses of the Constitution came within the category of exclusive powers of the national government. The category of exclusive powers was to be transformed into an enforceable legal concept which authorized the invalidation of state regulations in conflict with it. The legal conclusion was that the state had exercised powers belonging solely to the national government. If state regulations included subjects within the national powers, they were limited to those subjects includible within the concurrent power category. The legal concept of exclusive powers was devised in order to use the judicial process against the expanding powers of the state governments. But the supporters of the nationalist position faced considerable difficulty in determining what powers of the national government were exclusive, and in determining also the point at which the subjects of exclusive national

117. Livingston v. Van Ingen, 9 Johns. R. 507, 538-39 (N.Y. Ct. Err. 1812). No. 32 of THE FEDERALIST, like the other numbers, was written to answer the attacks against the Constitution that the states would be destroyed absolutely as governmental units unless they were allowed to retain their absolute sovereignty. It was to allay these fears and to ease the way for adoption of the Constitution in the various state conventions, in New York and Virginia especially, that the papers were written. The explanatory statements about the Constitution pertained to divisions of legislative powers between the national government and the governments of the member states, and did not pertain to the judicial powers. See generally 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 8-11 (1953). The noted author of Number 32 presumed that the existence of abstract powers in the national government axiomatically carved the subjects from state powers, even prior to the bringing of subjects into our national laws by the Congress. Further, when judicial review was initiated, counsel for invalidation of a specific execution of state powers alluded to the presumption of exclusive powers, and declared that it was the role of the courts to enforce this carving away of state powers without regard to the great need for continuation of those powers in the states. The author wrote:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.

The author continued in his attempt to elucidate how to determine which powers were to be exclusive powers. He explained:

> This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in other prohibited states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.*

THE FEDERALIST No. 32, at 186 (Lodge ed. 1888).

powers ended and the states' police powers began.[118]

Counsel's presentations in behalf of the Van Ingen interests pertained mostly to vague theories about the Constitution which in turn were transformed by counsel into enforceable legal principles. Subjects of exclusive powers were said to require the unitary regulations that only the national government could give them. Subjects of concurrent powers were not withdrawn by the mere granting of powers to the national government. As to these there was no necessity of unitary regulations. Federalism then, a process of the interrelation of state with national powers, was said to be limited to the subjects of concurrent powers. Subjects relating to patent grants and commerce were shown to be exclusive by omitting them from counsel's listing of the subjects of concurrent powers; there was no close-order analysis to show upon what criteria the subjects of the patent and commerce clauses necessitated unitary national regulation. Along with the powers to tax—always recognized as concurrent—counsel listed the powers "to coin money and regulate its value, and to fix the standard of weights and measures, to establish post-offices and post-roads," as concurrent, as "they relate to the common concerns of society and the public good, they may be exercised by the states, until congress shall legislate upon these subjects. . . ."[119] But just as soon as the Congress had enacted laws, relative to those objects, there was an end to the state laws; they were superseded and absorbed in the supreme law of the land.

As the Congress had enacted legislation providing for copyrights and patents, state powers over those subjects were at an end. It made no difference whether the patent powers were deemed concurrent or exclusive. The grant made by the New York legislature to Livingston and Fulton of the exclusive privileges of navigation on the public waters of New York was said to constitute a regulation conflicting with the objects covered in the act of the Congress relating to copyrights and patents.

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118. It was assumed that the judicial function was primarily to prevent the states from regulating the subjects of the national powers. Thus a political concept of constitutionalism, devised to preserve the existence of the government, purported to constitute a rule of law for the enforcing of the provisions of the Constitution against the functioning of state powers. But in the actual course of judicial administration the national courts were used for the nationalization of private rights in review of the prerogative of state powers, not primarily for prohibiting the member states from regulating the subjects or objects of government within Congress' exclusive powers. When confronted with legal doctrines, which were based upon the various abstract theories and subjectivities about the Constitution, the national courts pretended to act more as a council of revision than a court of law. But when dealing with the judicial remedies, and the more substantial grounds for the exercise of the judicial power against the prerogative of state powers to govern, the national courts reflected more of the indicia of courts of law in the traditional sense.

119. Livingston v. Van Ingen, 9 Johns. R. 507, 539-40 (N.Y. Ct. Err. 1812).

The state had granted more extensive privileges than the Congress had granted in the exercise of its patent powers. But in addition, the state powers over subjects of commerce had previously been alienated to the national government by the Constitution. The powers of government over commerce and trade could not be other than exclusive powers; they were inherent in the sovereignty of the national government like "borrowing money on the faith of the United States." The "powers to regulate commerce with foreign states, and between the states, to establish a uniform rule of naturalization, and uniform laws of bankruptcy, [were] naturally and impliedly, exclusive, for if the different states were to exercise those powers concurrently, it would introduce that confusion and diversity which the constitution intended to prevent."[120]

Counsel for the Livingston and Fulton interests emphasized, in opposition, the practice of the two governments living as one nation under the Constitution. Accordingly, the making of national law had to be drawn from practical experience as well as from the making, the language, and the theories of the Constitution. Counsel showed that the Congress in the exercise of its delegated powers had selected the subjects to be withdrawn from the member states. The Congress had suspended state powers when, and only when, such suspension was made an aspect of a legislative formulation of national policy. On a number of occasions the Congress had expressly, or by implication, suspended state powers over various subjects which the states had previously included within their regulations. These legislative precedents showed conclusively, it was contended, that all state powers continued until the Congress legislated a direct suspension over specified subjects and objects of government included within a national uniform policy.

Following the adoption of the Constitution, when Congress' powers over the granting of exclusive patents came into being, the states had continued their practice of legislative enactments granting exclusive privileges either in the form of patent or franchise delegations which the state promised to recognize and preserve for a term of years.[121] The

120. *Id.* at 539.

121. The court noted that the state of New York had granted a patent to James Rumsey just a few weeks before the meeting of the first Congress under the Constitution. *Id.* at 550. The Rumsey patent was granted by act passed the 26th of Feb., 1789. 3 N.Y. Laws 71-72 (1887). The patent was granted upon a representation of "a new and easy method of generating steam in large quantities for the purpose of working engines by forcing a small quantity of water through one or more incurvated tubes placed in a furnace which tube or tubes is distinguished by the name of a pipe boiler. . . ." James Rumsey and his executors, administrators, and assigns were vested with "the sole and exclusive right of making and using or permitting others to make and use the . . . engines and improvements . . ." described in the statute for a period of fourteen years. Violation of Rumsey's exclusive rights was subject to statutory damages in the

first exercise of Congress' copyright and patent powers was in the first Congress in 1790.[122] A general statute was enacted in 1793 which authorized the administrative granting of exclusive privileges in inventions for a period of fourteen years, but containing the proviso that the exclusive grant could be made only upon condition the applicant surrendered all his rights and privileges derived from exclusive grants made by the legislatures of the member states.[123] A similar statutory evolution had occurred under the naturalization powers of the national government. Congress had enacted naturalization legislation in the first Congress,[124]

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amount of one hundred pounds, recoverable by action of debt. *Ibid.* Rumsey had also been granted exclusive franchise for steamboat propulsion in the states of Virginia and Maryland. Rumsey also secured English patents on his steam boiler and steamboat, and similar patents were granted him in 1791 by the United States. See 1 BISHOP, A HISTORY OF AMERICAN MANUFACTURERS 75-77, 594-95 (1864); Mitman, *James Rumsey,* in 16 DICTIONARY OF AMERICAN BIOGRAPHY 223 (1943).

122. The first statute of the Congress *to promote the progress of useful Arts* was the Act of April 10, 1790, enacted in the Second Session of the First Congress ch. 7, 1 Stat. 109. Petitions for a patent in inventions were to be made jointly to the Secretary of State, the Secretary of the Department of War, and the Attorney General of the United States. Letters of patent in declaration of exclusive rights in the invention were to be granted for a period of fourteen years. Damages for infringement of the grant were left to assessment by a jury.

123. The original Act of April 10, 1790, ch. 7, 1 Stat. 109, was repealed by the subsequent Act of Feb. 21, 1793, enacted during the Second Congress, Second Session ch. 11, 1 Stat. 318. Section 7 of the Act of Feb. 21, 1793, contained the proviso placing the burden upon the patentee to relinquish his exclusive rights under state law:

> Sec. 7. *And be it further enacted,* That where any state, before its adoption of the present form of government, shall have granted an exclusive right to any invention, the party claiming that right, shall not be capable of obtaining an exclusive right under this act, but on relinquishing his right under such particular state, and of such relinquishment his obtaining an exclusive right under this act shall be sufficient evidence.

Apparently the phrase "That where any state, before its adoption of the present form of government" was not intended as a limitation upon the operation of the act of Congress; in subsequent administration of the act the requirement of waiver was applicable to state grants made after adoption of the Constitution as well as those made prior to September, 1788. The Congress did not engage in this roundabout manner as a subterfuge, because it was thought the Congress lacked the supreme power to have directly suspended the governmental powers of the member states from the subject of patents. The private rights in a patent franchise were considered vested property rights in the common law which was considered to be as much the law of the United States as in the member states, and it would have conflicted right reason for the Congress to have expunged the state powers and the grant under those powers. Thus it was thought to be a compliance with the good faith a government had to honor, for the Congress to hold out what were thought to be inducements in administrative privileges that were considered to be superior to those that had previously been granted the patentees in the special legislation of the member states. Counsel for the Livingston and Fulton franchise suggested that there were no such limitations on state powers as this implied and that national privileges were superior privileges. Because the state powers were unlimited they could have extended the grant of a patent into eternity and to another planet if they had but desired to do so.

124. The first naturalization act was the Act of March 26, 1790, titled *An Act to establish an uniform rule of Naturalization,* enacted in the Second Session of the First Congress ch. 3, 1 Stat. 103. In the first statute Congress initiated the tradition that an applicant for United States citizenship may make application "to any common law court

and the states continued to grant citizenship as if their sovereign powers over the naturalization of aliens continued after the adoption of the Constitution.[125] Then by the Act of the 14th of April, 1802, Congress

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of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer. . . ." *Ibid.* The act recognized the application—but not necessarily the continuance—of state power in naturalization in the following proviso: "Provided also, That no person heretofore proscribed in any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed." Act of March 26, 1790, ch. 3, 1 Stat. 104.

The 1790 naturalization act was repealed by the Act of Jan. 29, 1795, titled, *An Act to establish an uniform rule of Naturalization; and to repeal the act heretofore passed on that subject.* Ch. 20, 1 Stat. 414. As in the original act, citizenship of the United States was cognizable to "any alien, being a free white person. . . ." The various district courts of the United States as well as the state courts were authorized to affirm the transference from alien to citizenship status. The Naturalization Act of 1795 initiated the requirement that the alien renounce his prior allegiance to "any foreign prince, potentate, state or sovereignty," and also provided that "no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain, during the late war, shall be admitted a citizen . . . without the consent of the legislature of the state, in which such person was proscribed." Act of Jan. 29, 1795, ch. 20, 1 Stat. 415.

125. An act entitled *An Act to naturalize the persons therein named, and to prevent the avoidance of titles in certain cases by reason of alienism,* was passed by the New York legislature on the 28th of Feb., 1789. 3 N.Y. Laws 83 (1887). The New York statute required that each naturalized person renounce all former allegiance to a "foreign king, prince, potentate and State," and that each of the one hundred or so persons naturalized by the act take an oath of allegiance to the state of New York. The act provided that no titles to property held by the persons named in the act shall be defeated or be subject to escheat because of their former alien status. One of the prime purposes for state allegiance was to protect titles to property held under the original grants in the colony from application of the common law rule against alien titles. Thus the various state naturalization acts were a necessity in order to protect the titles to the large land holdings held under the English law of the colonies. It was not possible to await action of the national government; the problem was too acute. Action of the national government came later under reciprocal treaties with European nations which gave some protection, enforcible under national law, to the titles of the landholdings under the English law of the colonies.

The case of Collett v. Collett, 2 U.S. (2 Dall.) 294 (1792), was decided in the circuit court of the United States for the District of Pennsylvania, in the April Term, 1792, composed of Associate Justices Wilson and Blair of the Supreme Court and Judge Peters of the district court. The complaint filed a bill in equity alleging that he was still "a subject of his Britannic Majesty" and that the respondent was a citizen of Pennsylvania. A question was raised on the diversity jurisdiction of the circuit court, as the respondent averred in his plea, and it was certified as of public record, that the complainant had taken an oath of allegiance to the State of Pennsylvania on the 30th of April, 1790, under an act of the legislature of Pennsylvania passed the 13th of March, 1789. Complainant contended that the Pennsylvania act became a nullity after the Act of the Congress of March 26, 1790, ch. 3, 1 Stat. 103, the first act under the uniform naturalization power, and that complainant's oath of allegiance to the State of Pennsylvania had also been nullified after the act of Congress. It was contended also that the naturalization power was exclusive in Congress and that the Pennsylvania act—passed the 13th of March, 1789—was null and void in its inception.

The circuit court limited its determination to the question of whether the state act of March 13, 1789, became null and void upon the passage of the Act of the Congress of

withdrew the subject from the states in the statutory preamble which declared that "any alien, being a free white person, may be admitted to

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March 26, 1790, on the ground that the state powers over the subject were suspended by the Congress from that date. The court answered the question in the negative. It was determined that the states

> still enjoy a concurrent authority upon this subject; but that their individual authority cannot be exercised, so as to contravene the rule established by the authority of the Union. The objection founded on the word *uniform,* and the arguments *ab inconvenienti* have been carried too far. It is, likewise, declared by the Constitution . . . that all duties, imposts and excises shall be *uniform* throughout the *United States;* and yet, if express words of exclusion had not been inserted . . . the individual States would still, undoubtedly, have been at liberty, without the consent of *Congress,* to lay and collect duties and imposts.

Collett v. Collett, *supra* at 296. It was surmised that "The true reason for investing *Congress* with the power of naturalization . . . was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship." *Ibid.* Thus it was thought that the member states could not exclude those citizens who had been granted citizenship by or under a statute of Congress, but they could adopt the same or easier terms for state citizenship. The court relied on Congress' recognition of the continuation of state power as expressed in the proviso of the Naturalization Act of 1790: "That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed." Ch. 3, 1 Stat. 104. Therefore under the laws of the United States, the complainant was a citizen of Pennsylvania and the circuit court lacked jurisdiction.

Compare Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817), in which Chief Justice Marshall begins the opinion of the Court with the determination that "the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be controverted," in effect overruling the opinion of Mr. Justice Wilson in Collett v. Collett, *supra,* and without any direct citation. Chirac v. Chirac, *supra* at 269. The Court's determination in the *Chirac* case was made comparatively easy by the Act of the Congress of the 14th of April, 1802, ch. 28, 2 Stat. 153, wherein the Congress had taken over the regulation of conditions for "citizen of the United States" and had by explicit provision excluded the states from the naturalization of citizens. The act of the Congress referred to would not exclude the giving of some appropriate effect to state citizenship, secured by resident, domicil or some other act or state of mind, but the attribute of a "citizen of a state" could no longer have the effect of changing a person's status from alienage to that of citizen of the United States.

As a matter of interest and study the *Chirac* case involved a number of factors which affected the transition from state to federal law in the naturalization of citizens. In 1778, the Congress of the United States of America ratified a treaty between France and the United States which declared: "The subjects and inhabitants of the United States, or any one of them, shall not be reputed Aubians (that is aliens) in France," and provided:

> They may, by testament, donation, or otherwise, dispose of their goods, moveable or immoveable, in favour of such persons as to them shall seem good; and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat,* without being obliged to obtain letters of naturalization. The subjects of the most christian king shall enjoy on their part, in all the dominions of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present article.

In 1880, the General Assembly of Maryland by *An ACT to declare and ascertain the privileges of the subjects of France residing in this state,* laid down the conditions for making the treaty of 1778 between the United States and France the law of Maryland. See 1 Md. Rev. Laws 290-91 (Maxcy, 1811).

The 2d section of the Maryland statute gave the subjects of the King of France, who may sojourn or reside in Maryland, the enjoyment of "all . . . the rights, privileges and exemptions, of the full and free citizens of the state, without taking any oath, or giving any promise of allegiance or fidelity . . ." to the state. The 3d section of the

become a citizen of the United States, or any of them, on the following

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Maryland statute contained a proviso which restricted and limited the rights and privileges of the subjects of France, sojourning and residing in Maryland, from the ownership of lands and real estate, by the declaration that the act shall not be construed "to grant to the subjects of France . . . who shall continue subjects of said majesty, and not qualify themselves as citizens of this state, any right to purchase or hold lands or real estate, but for their respective lives or for years, or to invest them with the privilege of voting in any election . . ." etc. The 4th section provided that if any subject of the King of France, who had qualified and become a citizen of Maryland, shall die "seised in fee of any real estate," whether by last will or testament, or by intestacy, "the devisee or devisees appointed in and by such will or testament," or "the natural kindred of such decedent," "whether residing in France or elsewhere," were treated as citizens of the state of Maryland for purposes of taking the property, but subject to the proviso in the 5th section,

> That whenever any subject of France shall become seised in fee of any real estate within this state, by virtue of any such last will or testament, or by inheritance . . . his or her estate therein, after the term of ten years be expired, shall vest in the state, unless the person seised of the same, within that time, either come to settle in and become a citizen of this state, or infeoff thereof some citizen of this, or some other of the United States of America.

See Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 262-63, 264-67, 267-69, 269-70 (1817).

Following the adoption of the Constitution and the consequential legislation in the Congress came the ratification of the historic Convention between the French Republic and the United States. 8 Stat. 178. Article VII provided, as to reciprocity in the rights of ownership and grants of property:

> The citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation, or otherwise, of their goods, moveable and immoveable, holden in the territory of the French Republic in Europe, and the citizens of the French Republic shall have the same liberty with regard to goods, moveable and immoveable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries, who shall be heirs of goods, moveable and immoveable, in the other, shall be able to succeed *ab intestato,* without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded, under any pretext whatever; and the said heirs, whether such by particular title, or *abintestato,* shall be exempt from any duty whatever in both countries . . . and also that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be, and the other nation shall be at liberty to enact similar laws.

John Baptiste Chirac, a native of France and naturalized a citizen of the State of Maryland on 22d of September, 1795 (under the act passed in the 1779 session of the Maryland legislature, 1 Md. Rev. Laws 362 (Maxcy, 1811)), and naturalized a citizen of the United States on the 6th of July, 1798, died intestate in July, 1799, owning real estate in fee which he received after he became a citizen of Maryland, but with no legitimate heirs except citizens of the Republic of France living in France. The State of Maryland determined the lands escheatable and transferred them to John Charles Francis Chirac, the natural son of the intestate. The heirs at law brought an action in ejectment in the circuit court for the district of Maryland, which court ruled in their favor on the basis of the Convention of 1800. The death of the deceased had taken place after the Act of Congress of 1798, in abrogation of all treaties between the United States and France. Also, the grant to the natural son had been subject to compliance, by the heirs at law, with the 10-year proviso in the Maryland statute. The main question for determination was the applicable law, the statute of Maryland of 1780, enforcing the treaty of 1778, or the Convention of 1800. The Court held all were applicable to the circumstances of the case, the former to the determination that John Baptiste Chirac died seised in fee, and the Convention of 1800, for the ultimate determination

conditions and not otherwise."[126] This enactment purported to exhaust the subject, in the sense of suspending state powers over citizenship and naturalization. Counsel contended that the taking over by the national government of selected subjects of government from the member states, as delineated in the patent and naturalization acts of the Congress, showed conclusively that the suspension of state powers had to await the readiness of the Congress to assume dominion over a particular subject of government. Because there had been no process of general suspension or alienation of state powers by the Constitution, the court was not empowered to use the patent and commerce clauses of the Constitution as authority to enforce a judicial invalidation of the exercise of state powers.

Counsel's presentations were succinct and to the point that the commerce clause did not constitute authority for the judicial invalidation of state powers. Counsel pointed first to those assuaging lines in behalf of state powers in the famous number thirty-two of *The Federalist* which were designed to alleviate fears of the consequences which would befall the governments of the member states after the adoption of the Constitution. *The Federalist* author wrote that:

> [T]he necessity of a concurrent jurisdiction, in certain cases, results from the division of sovereign power: and the rule that all authorities, of which the states are not explicitly divested in favor of the Union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument; . . . not withstanding the affirmative grants of general authorities, there has been most pointed care, in those cases where it was deemed improper that the like authorities should reside in the states. . . .[127]

Counsel's second showing was the more appropriate for making the national law favorable to the continuation of the Livingston-Fulton franchise. Authority in the national government over foreign and domestic trade, and trade with the Indians, could not be exclusive because so many aspects of those powers involved activities affecting the social and community interests of a state. The states had previously engaged in extensive regulations dealing with objects of local and community interests which did not involve the peoples and interests of other states.

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that the heirs at law, citizens of France, took the property in fee, limited, according to the Maryland statute, to a power of sale. Thus the national law was built upon the state law and both made the law of the United States, as the authority of the state law had been incorporated in the Convention of 1800.

126. Ch. 28, 2 Stat. 153.

127. Livingston v. Van Ingen, 9 Johns. R. 507, 548 (N.Y. Ct. Err. 1812).

Examples of such regulations listed by counsel included transportation facilities, such as toll-gates and bridges, ferries and canals, as well as other facilities "for the accommodation of the public, and the convenience of social intercourse."[128] On the other hand, counsel for the franchise restricted the reach of the legal consequences of such state regulations. He did not represent that New York had the sovereign authority to enact or to continue such policy regulations independent of Congress' legislative powers under the commerce clause. It was recognized that "all these state regulations are valid, subject . . . to any express law of congress on the same points."[129]

The New York Court of Errors was unanimous in its reversal of the Chancellor. In conclusion, it directed a permanent injunction which gave full and complete protection to the exclusive navigation rights of the Livingston and Fulton franchise.[130] The most noted of the seriatim opinions was that of James Kent's, then Chief Justice of the New York Court of Errors.[131] Kent did not rely on the application of natural law, or on

128. Livingston v. Van Ingen, 9 Johns. R. 507, 554-55 (N.Y. Ct. Err. 1812).

129. *Id.* at 555.

130. The judgment of reversal handed down by the New York Court of Errors decreed that

> [A] writ of injunction issue, restraining and prohibiting the respondents from using and employing the boat or vessel, called the Hope . . . on any of the waters of this State, in contravention of the legislative grant and privilege made to, and vested in, the appellants, as in their bill set forth; and that such injunction be continued until the final hearing of the cause in the Court of Chancery; and that the injunction ought then to be made perpetual, so long as the exclusive right and privilege of the appellants shall continue under the acts of the Legislature of this State. . . .

Id. at 590.

131. Chief Justice Kent wrote that in his understanding of the equitable principles of the common law, which he thought were as binding upon the courts of his state as on the courts of England:

> Injunctions are always granted to secure the enjoyment of statute privileges of which the party is in actual possession, unless the right be doubtful . . . and the decisions in the English Chancery on this point, were the same before as since the American Revolution; and we are, consequently, bound by them as a branch of the common law. . . . [*Id.* at 585.] The principle is, that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed, until the opponent has fairly tried them at law, and overthrown their pretension. And is not this a most excellent principle, calculated to preserve peace, and order, and morals, in the community . . .? [*Id.* at 587.] It would only be productive of litigation and mischief, to allow respondents to continue the use of their boats, if the right be against them. . . . And nothing would be more useless than to withhold an injunction until the Chancellor had sent the question to be tried at law, when the judges before whom it is to be tried are members of this court, and have already declared their opinion. . . . [*Id.* at 588.] If the laws are valid, it would be of pernicious consequence not to arrest the further progress of their violation. It is impossible for any act to be committed which attracts more universal notice, and if wrong and illegal, none which has a more fatal influence upon the general habits of respect and reverence for the legislative authority. The boats cannot

Chancellor Lansing's principal authority, the Institutes of Justinian. He was distinctly unimpressed with the *jus publicum* limitations upon the *jus privatum* as legal limitations upon the authority of the state legislature in the making of exclusive grants to private persons.[132] Kent's opinion may

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run but in the face of day, and in the presence, as it were, of the whole people, whose laws are set at defiance, nor without seducing thousands, by the contagion of example, into an approbation and support of the trespass. [*Id.* at 588-89.]

Kent cited both English and American authority for the proposition that injunctions always issue "to secure the enjoyment of statute privileges of which the party is in actual possession, unless the right be doubtful." *Id.* at 586-88. His certainty about the use of the injunction as an independent remedy preserving private rights while the statutory remedies of money damages and forfeiture were processed was further supported by an act of the New York legislature, passed April 9, 1811, which created a duty on the part of the Chancellor to issue an injunction upon the commencement of an action in law to secure a judgment. The act provided:

> That when any writ, suit or action is brought for the recovery of such forfeitures, the defendant or defendants . . . in so navigating in contravention of . . . law, shall be prohibited by writ of injunction from navigating with or employing the said boat or boats, engine or engines, or from removing the same or any part thereof out of the jurisdiction of the court, or to any other place than that which shall be directed for their safe keeping by the court during the pendancy of such suit or suits, action or actions, or after judgment shall be obtained, if such judgment shall be against the defendants, or the matter or thing forfeited.

6 N.Y. Laws 286 (Websters & Skinners 1812).

132. Livingston v. Van Ingen, 9 Johns. R. 507, 572-89 (N.Y. Ct. Err. 1812). The other seriatim opinions were written by Joseph C. Yates and Smith Thompson. *Id.* at 558-62, 563-72. The opinions are critically analyzed with reference to the nationalization of the commerce clause in 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 231-34 (1953). The three opinions followed a uniform pattern of content and grounds, showing that there was a general agreement among the judges that the state court's primary obligation was to enforce the law of its own jurisdiction. There was likewise a general uniformity as to the unavailability of the delegated powers of the Constitution as independent authority allowing the Court to review—and thus to invalidate—what was referred to as the "retention" of state powers, and that in general the court of a state had no standing to review the validity of a state statute under the authority of the Constitution. To do so would consitute an administering of the judicial powers of the national government, which was of no concern to the state court and was outside its jurisdiction. In general, a question of the validity of state legislation was restricted to a conflict with an act of the Congress the validity of which likewise was outside the state court's jurisdiction for it was the exclusive function of the national courts to interpret and enforce the acts of the Congress.

Justice Yates anticipated the use of the tenth amendment (which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people") as the legal authority in the Constitution for the "enumerated powers" concept as a canon of constitutional interpretation. For a discussion of this concept of constitutional construction, see Corwin, *The Passing of Dual Federalism,* 36 VA. L. REV. 1, 4-9 (1950). Yates construed the patent power (which delegates to Congress the general authority "to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries") narrowly and axiomatically as "limited to authors and inventors only," so as not "to prohibit the respective states from exercising the power of securing to persons introducing useful inventions . . . the exclusive benefit of such inventions. . . ." *Id.* at 560. According to Yates, all powers were retained by the member states until an exercise of such powers "interferes with the laws of the United States. . . ." *Id.* at 561. And whenever such an interference with an act of the Congress occurred it was a matter that remained

be characterized as comprehensive; it was almost an esquisse of the Constitution in which he purported to preserve the private property rights which the laws of the state had created in the legislative enacted monopoly. He gave a minimal concern to the abridgment of private rights resulting from the state-enforced monopoly.

Kent's approach was that of a supreme authority within the self-imposed limitations of the great common law judge, steeped in *Blackstone* and the other great commentaries of the common law. He set a judicial aura by stating a traditional mode of judicial decision-making. "This house," he said, "sitting in its judicial capacity as a court, has nothing to do with the policy or expediency of these laws."[133] Kent's statement of the question was whether the legislature of the state continued to have the requisite constitutional authority for granting the exclusive franchise. The principle of law, and authority for deciding this question, was to be formulated from the judicial construction of the Constitution. Constitutional interpretation was to be made by applying the rules of construction that the court had laid down for itself to follow. Rules of construction—the modus operandi of judicial decision-making—were said to have the effect of insulating the judiciary from the broad policy questions.

"exclusively with the courts of the United States to interpose. . . ." *Ibid.* The New York laws granting exclusive privileges could not interfere with the authority of the commerce clause because the exclusive privileges were limited to navigable waters within the confines of the state, and if such regulations came within the national power "almost all subjects of legislation would be swallowed up, and it might, eventually, lead to the total prostration of internal improvements." *Id.* at 561. Thus the state court's final concern was with the legal authority of the privileges and immunities clause, which in intent and purpose was said to be limited to discrimination against the citizens of other states.

Justice Smith Thompson, who later was appointed to the Supreme Court of the United States, applied the same rule of constitutional construction as did Justice Yates, arriving at the same conclusion that all state powers of government were retained and continued in the state as before the adoption of the Constitution except in "case of collision . . . the state laws must yield to the superior authority of the *United States.*" *Id.* at 566. The national powers over patents and copyrights and the regulation of commerce were enumerated and thus limited powers, leaving the total sovereignty over these subjects in the member states. Thus the private rights under the exclusive franchise were paramount until questions of conflicting rights under an act of the Congress were raised. Thompson stated that "the only restriction upon the state government in the exercise of the concurrent powers is, that the state must act in subordination to the general government." *Id.* at 567-68. The only exclusive powers which Thompson recognized were those not existing in the states prior to the adoption of the Constitution, such as the power to borrow money on the credit of the United States. As to the commerce power, Thompson went over further in limiting the national government in order to enlarge the states' powers. If the exclusive franchise could "be considered a regulation of commerce, it is the internal commerce of the State, over which Congress has no power. . . ." *Id.* at 568. As alleged by counsel in *Elkison v. Deliesseline* respecting South Carolina's internal security power, the exclusive franchise was a subject of internal commerce and "it never has been, either expressly or impliedly, yielded to the general government." *Ibid.*

133. Livingston v. Van Ingen, 9 Johns. R. 507, 572 (N.Y. Ct. Err. 1812).

Initially the presumption in favor of the validity of the state legislation "must be admitted to be extremely strong."[134] The judicially-created presumption was stated to be firmly established in this case because similar legislation had been enacted five times in New York without a trace of constitutional objection.[135] And the presumption was even more weighted because the statute was enacted when the first Chief Justice of the United States was the state's chief magistrate, a man distinguished "for the scrupulous care and profound attention with which he examined every question of a constitutional nature."[136]

Kent did not rest his determination on presumption alone. He theorized about the general nature of the Constitution with reference to those rules of construction which had the effect of giving recognition to the need for the continuation of wide and expanding powers of the state legislatures. But the great judge was not of one mind in relation to the respective powers of the nation's governments; he did not wish to give support to the dogma-ridden theories of the state rights position. He recognized that "powers [granted to the general government] whether expressed or implied, may be plenary and sovereign, in reference to the specified objects of them. They may even be liberally construed in furtherance of the great and essential ends of the government."[137] The question of the statute's validity did not pertain to the scope of national powers.[138] "It does not follow," Kent emphasized, "that because a given power is granted to Congress, the states cannot exercise a similar power."[139] If the people of these United States had created "a single, entire government," the powers of the national government would have been indefinite and incapable of enumeration, and the government then would have contained all rights of sovereignty. On the other hand, when a federal government is erected which contains a portion of the nation's sovereign powers "the rule of construction is directly the reverse, and every power is reserved to the member that is not, either in express terms, or by necessary implication, taken away from them, and vested exclusively in the federal head. This rule has not only been acknowledged by the most intelligent friends of the constitution, but is plainly declared by the instrument itself."[140]

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134. *Ibid.*
135. *Id.* at 573.
136. *Id.* at 574.
137. *Ibid.*
138. *Ibid.*
139. *Ibid.*
140. *Ibid.* Kent gave the following example in support of this so-called "rule of construction:"

Congress has power to lay and collect taxes, duties and excises, but as these

The consequence of this judicial formulation of national law was a continuation of the governmental authority of the member states substantially as before the Constitution. Kent did not theorize the dual-state sovereignty approach which attempted a reconstruction of the Constitution by narrowing the national powers and continuing state powers in the form of independent sovereigns. The state powers were to continue until the Congress had enacted legislation which clearly suspended those powers, or at least until a clear precedent was established by the

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> powers are not given exclusively, the states have a concurrent jurisdiction, and retain the same absolute powers of taxation which they possessed before the adoption of the Constitution, except the power of laying an impost, which is expressly taken away. This very exception proves that, without it, the states would have retained the power of laying an impost; and it further implies, that in cases not excepted, the authority of the states remains unimpaired.

Livingston v. Van Ingen, 9 Johns. R. 507, 574-75 (N.Y. Ct. Err. 1812). *See contra,* Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), as to the effect of the explicit prohibition against state taxation on imports and exports upon the meaning of the Constitution, with reference to powers of government, national and state, and the independent authority to formulate national law in review of state powers. State taxing powers are of course limited through judicial review of the state's prerogatives in ways not applicable to the national powers and not conceived of by Kent, and the states' taxing powers are not, as Kent thought, "concurrent powers" outside the legal authority of the Constitution except when in conflict with an act of the Congress. *Compare, e.g.,* Freeman v. Hewitt, 329 U.S. 249 (1946), *with* New York v. United States, 326 U.S. 572 (1946).

One of the "most intelligent friends" of the Constitution of whom Kent was speaking was Mr. Hamilton, who, according to Kent, drafted the thirty-second number of THE FEDERALIST. It is doubtful that THE FEDERALIST reflected Hamilton's thinking on the Constitution. Nevertheless, Kent interpreted Hamilton according to that work, in the following:

> [H]e admits that all the authorities of which the states are not explicitly devested, remain with them in full vigor, and that in all cases in which it was deemed improper that a like authority, with that granted to the Union should reside in the states, there was the most pointed care in the Constitution to insert negative clauses. He further states that there are only three cases of the alienation of state sovereignty: 1. Where the grant to the general government is, in express terms, exclusive; 2. Where a like power is expressly prohibited to the states; and 3. Where an authority in the states would be absolutely and totally contradictory and repugnant to one granted to the Union; and it must be, he says, an immediate constitutional repugnancy that can, by implication, alienate and extinguish a pre-existing right of sovereignty.

Livingston v. Van Ingen, 9 Johns. R. 507, 576 (N.Y. Ct. Err. 1812). Further, according to Kent, Hamilton was of the same mind during the New York convention held to adopt or reject the Constitution, for

> The same view of the powers of the federal and state governments, and the same rules of interpretation, were given by him, in the discussions which the Constitution underwent in our State Convention, and they seem generally, if not unanimously, to have been acquiesced in by the members of that very respectable assembly. . . .

Ibid. These opinions—Kent's interpretation of Hamilton on the Constitution—from one "who had bestowed intense thought, not only upon the science of civil government at large, but who had specially and deeply studied the history and nature, the tendency and genius of the federal system of government . . . may be regarded as the best evidence of the sense of the authors of that instrument, the best test of its principles, and the most accurate contemporary exposition to which we can recur." *Id.* at 576-77.

Supreme Court's formulation of national law which was binding upon a state court. It was not the function of the New York Court of Errors, Kent thought, to formulate national law out of the authority of the Constitution which was binding upon all the nation's governments. The job of formulating national law from the authority of the Constitution was the peculiar function of the nation's highest tribunal. The supremacy clause and the tenth amendment were cited as justifying the limited role of the state court in the peculiar construction he gave the Constitution. The tenth amendment was cited as justifying the continuation of state power under the logical but impractical Chief Justice Taney-like construction, that "the powers of the two governments are each supreme within their respective constitutional spheres."[141] This proposition conflicted with the parallel construction of the supremacy clause by which the powers of the state were made subordinate to the legislative powers of the Congress. The supremacy clause was apparently limited by the court as enforcing an act of the Congress against the authority of the state.

Kent thought that a constitutional invalidation of the state regulation from the authority of the commerce clause would result in "theoretical difficulties," which would overtax the court's sagacity "to see whether the law might not contravene some future regulation of commerce, or some moneyed or some military operation of the United States."[142] But he expressed much too limited a view of the powers of the national government and likewise too broad a view of state powers. The scope of the commerce powers was limited to activities not wholly within a single state. He anticipated the reasoning of the Taney Court when he determined that "all internal commerce of the state by land and water remains entirely and . . . exclusively within the scope of its original sovereignty."[143]

Kent failed to conceive that the reach of the commerce powers must be largely a legislative question and not a subject for abstract judicial determination.[144] Judicial review to determine the possible scope of the

141. Livingston v. Van Ingen, 9 Johns. R. 575 (N.Y. Ct. Err. 1812). The state act was not subject to the formulation of national law, for "The ratification of the Constitution by the Convention of this State, was made with the explanation and understanding, that 'every power, jurisdiction and right, which was not *clearly* delegated to the general government, remained to the people of the several states, or to their respective state governments.'" *Ibid.*

142. *Id.* at 576.

143. *Id.* at 578.

144. Kent wrote:

> Our safe rule of construction and of action is this, that if any given power was originally vested in this State, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the states, we may then go on

national powers had to follow and be related to the judicial enforcement of an enactment of the Congress.[145] But Kent was right when he suggested that the formulation of national law from the authority of the Constitution was the unique function of the Supreme Court. This was recognized in section twenty-five of the Judiciary Act. The state courts were bound by the law of the state until the national law was formulated by that higher authority whose law formulations were clearly recognized as binding upon the governmental authority of all the member states.[146]

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in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the state authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law.

Livingston v. Van Ingen, 9 Johns. R. 507, 576 (N.Y. Ct. Err. 1812).

145. Kent's construction of the Constitution was to exclude the law making function of the court from the review of the state's prerogative, but this did not mean that the states were likewise independent of the Congress in the exercise of its power. Thus the powers of the national and state governments:

[C]annot . . . be supreme over each other, for that would involve a contradiction. When those powers . . . come directly in contact, as when they are aimed at each other . . . the power of the state is subordinate, and must yield. The legitimate exercise of the constitutional powers of the general government becomes the supreme law of the land, and the national judiciary is specially charged with the maintenance of that law, and this is the true and efficient power to preserve order, dependence and harmony in our complicated system of government.

Livingston v. Van Ingen, 9 Johns. R. 507, 575 (N.Y. Ct. Err. 1812).

146. As Chief Justice of the New York Court of Erros, Kent made it doubly clear throughout his opinion in the *Livingston v. Van Ingen* appeal, and likewise as Chancellor in the subsequent case of Ogden v. Gibbons, 4 Johns. Ch. R. 150 (N.Y. Ct. Ch. 1819), that it was the function of the courts of the state not "to annihilate the legislative power of the states" but to preserve it. Kent followed the presumptive approach that an independent law-formulation role in the building of national law, in the process of judicial review of the state's prerogative, was in derogation and in annihilation of the state's powers. Thus it could not be a function of the state courts to formulate national law in review of the functioning of the state's powers, and the Constitution was interpreted as if there were no law-formulation role in the process of review of the prerogative of the member states. Essentially it was this approach, from the vantage point of a highly-berthed state court judge, that brought Kent in conflict with Webster and Marshall in the subsequent case of *Gibbons v. Ogden,* though the latter appeared to regret this conflict with a personage each held in such reverence. In Livingston v. Van Ingen, 9 Johns. R. 507, 579 (N.Y. Ct. Err. 1812), Kent wrote the following in support of his proposition about the Constitution:

It strikes me to be an . . . inadmissible proposition, that the State is devested of a capacity to grant an exclusive privilege of navigating a steamboat, within its own waters, merely because we can imagine that Congress, in the plenary execise of its powers to regulate commerce, may make some regulation inconsistent with the exercise of this privilege. When such a case arises, it will provide for itself; and there is, fortunately, a paramount power in the Supreme Court of the United States to guard against the mischiefs of collision.

Likewise under the patent power, according to Kent, the state was authorized to continue to exercise its sovereign powers to create monopolies in the form of exclusive franchises in steamboat navigation on its own waters, as Kent called them, unless and until the Congress or the courts of the United States manifested a superior authority that explicitly bound the state court, in place of the laws of the state of its own creation.

V. GIBBONS V. OGDEN—BACKGROUND CIRCUMSTANCES

Legal struggles which followed the advancement of steamboat technology resulted from the legislative grants by New York and other states of exclusive rights to navigate upon the public waters of the respective states. Questions arose as to the legal authority of a state to protect an exclusive franchise by prohibiting the right of entry into the state by non-licensed steamboats. The Livingston-Fulton franchise, for example, had granted exclusive rights for navigating by steamboat between points along the New Jersey coastline and points on Staten Island and Manhattan Island.[147] The ultimate legal question was whether the nationalization of private rights embodied in the freedom to navigate the nation's public waters by steamboat was required in order to overcome the restrictions resulting from the enforcement of the exclusive legislative franchises in the state courts.

The jurisdictional authority for nationalizing private rights to enforce the freedom of steamboat navigation was thought to turn on whether invalidation of the state franchise was required and, if so, what constitutional authority provided the most acceptable foundation for the Court's invalidation of the state action. The commerce clause, authorizing national regulation of the various aspects of commerce, and the various acts of the Congress providing for the enrolling and licensing of American ships appeared to constitute the more effective authorities for

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Id. at 581-83. See also, Parsons v. Barnard, 7 Johns. R. 144 (N.Y. Sup. Ct. 1810). In the case of Ogden v. Gibbons, 4 Johns. Ch. R. 150, 158 (N.Y. Ct. Ch. 1819), Kent spoke eloquently on this theme, in the following:

> If the state laws are not absolutely null and void from the beginning, they require a greater power than a simple coasting license, to disarm them. We must be permitted to require, at least, the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those laws, in direct collision and conflict, *before we can retire from support and defence of them. We must be satisfied that Neptunus muros, magnoque emota tridenti Fundamenta quatit.* (Emphasis added.)

147. According to the allegations made in the original bill, which were accepted as judicial findings of fact, providing the basis for the original injunctive decree against Thomas Gibbons, granted by Chancellor Kent in the New York Court of Chancery, Robert R. Livingston and Robert Fulton, under their exclusive franchise, had granted by indenture to John R. Livingston and his assigns the exclusive rights "to navigate from any place within the city of New York, lying to the south of the state prison, to certain places in the said indenture specified, and lying to the south of Powles Hook ferry, and particularly to Staten Island, Elizabethtown Point, Perth, and South Amboy, and the river Raritan up to New Brunswick." On the 5th of May, 1815, John R. Livingston, in turn, granted to Colonel Ogden the exclusive franchise over these waters for a period of ten years. After the death of Robert R. Livingston and Robert Fulton, in February, 1813, and March, 1815, their legal representatives covenanted with Colonel Ogden and his partner, and their assigns, releasing all rights to operate any boats which Colonel Ogden operated "on the Hudson River, on the sound between New York Island and Long Island, or between New York and Elizabethtown Point, or Elizabethtown." Ogden v. Gibbons, 4 Johns. Ch. R. 150, 151-52 (N.Y. Ct. Ch. 1819).

invalidating the state laws in question. But the judicial authority for invalidating the state franchise so dominated the litigation that the law providing for the judicial enforcement of private rights appeared to be included in the law formulated for decreeing the state act void.[148] Nevertheless, the freedom to own and operate a steamboat on all the nation's public waters was the real purport of the litigation, and enforcement of the freedom to navigate by steamboat was included in the Court's decree following its declaration invalidating the state law.

The fact that the case arose over the right to navigate into the waters of New York from another state, unhindered by the state laws in question, was not a material factor to the judicial determination. If the private rights of the entrepreneur in the new steamboat technology were to be nationalized it was not material whether these rights were exercised on the navigable waters that lay wholly within the state or on the public waters that lay between the land boundaries of two states like New York and New Jersey.[149] More significant was the result that the member

148. The constitutional theory and structure question of whether the national judiciary and the Supreme Court in particular have the jurisdiction, authority and responsibility, to formulate and declare law independent of the Constitution, laws and treaties of the United States is a subject too complex to interpose there, and it would be inapposite to the subject under discussion. *Compare* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923), *with* 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 818-64, 865-937 (1953). Also the subject is somewhat unreal; the judicial lawmaking of the Supreme Court and the federal judiciary generally when manned by great judges like William Howard Taft who served the Sixth Circuit and Learned Hand who served the Second has followed the formative approach to the growth of law drawn out of the Constitution, laws, and treaties of the United States, in line with the traditions similarly evolved by the Roman Praetor under the Roman law and the King's courts under the common law. Law drawn out of the three sources, the Constitution, laws and treaties of the United States, to a large extent has kept abreast of society's needs. It may be fair to say that the national judiciary, with the limited authoritative sources for its lawmaking has been more formative than the King's courts with the abstract unlimited sources for their lawmaking, at least when the comparison is made in the late 19th and the 20th centuries.

149. The decree in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239 (1824), was drawn with care so as to state broadly with no intrastate limitation the private rights in the freedom to navigate the waters of the United States. The decree stated in part as follows: "that so much of the several laws of the state of New York, as prohibit vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York, by means of fire or steam, is repugnant to the said constitution, and void." *Id.* at 240. In North River Steam Boat Co. v. Livingston, 3 Cow. 713 (N.Y. Ct. Err. 1825), the Court's decree in *Gibbons v. Ogden* was construed to be applicable to the private rights of entrepreneurs to ply the waters of the Hudson River between New York and Albany with a steamboat licensed under the act of Congress, and the holders of the exclusive francise in steamboat navigation under the New York statutes were therefore not entitled to an injunction in equity against the competition that followed the Court's decree. In the majority opinion it was made clear that the freedom of movement by navigation on waters wholly within the borders of a particular state was controlled by the national power. Chief Justice Savage of the New York Supreme Court wrote as follows:

states had to comply with the adjudicated national law; thus the case appeared to raise momentous political questions of state power versus national power. The common law court in building the adjudicative law of England relied on the authority of constitutional and administrative powers of the sovereign. The Supreme Court, on the other hand, had to devise fundamental law from the authority of the Constitution in order to justify the invalidation of authority in the member states. Invalidation was necessary to bring the pretended sovereignty of the states under the adjudicated national law. Thus the requirement of invalidating state authority has sometimes appeared to twist the Court's decision-making and law-formulation roles into what appears to be a process for the parcelling out of abstract powers of government.[150]

> This power of regulating commerce led to many difficulties and embarrassments, as we learn from the history of the times; and to prevent a recurrence of those commercial difficulties, was one great and leading inducement to the adoption of the present constitution. Any power, therefore, given to congress, short of the power to regulate that commerce to which the people of the United States had access, would not have secured the object so desirable to be attained; and it never could have been intended that, within the territory of a particular state, congress should define the rights and privileges of citizens of other states, while the state legislature should define the rights and privileges of its own citizens, in relation to the same subject. The framers of the constitution never supposed that they were splitting the jurisdiction over the subject, and leaving it liable to most of the difficulties which previously existed. If the several states may still regulate commerce, within the limits of their states, to the exclusion of congress, there is nothing left for congress to act on. If the power of congress is limited to voyages commencing in one state and terminating in another, then its jurisdiction is much abridged, and much of the act regulating coasting trade should be appealed.

Id. at 751. For a full treatment of the opinions and views expressed in *North River Steam Boat Co. v. Livingston* see 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 268-80 (1953).

150. Overemphasis on the sources of the Court's authority and the resultant slighting of the circumstances of particular cases, made in some opinions of the Court and in some, perhaps, in most, of the writings about the Court's work, has served somewhat to blur the essential fact that the Supreme Court is first and foremost a Court of law, which means that its fundamental job is to decide a particular case based upon the circumstances of the record and proof made in the case. Legal principles and standards providing a basis for a legal determination and remedy are drawn from the various clauses and principles of the Constitution, from legal precedents, from the laws and treaties of the United States, and from numerous additional sources. The actual determination for which the legal principles and legal standard are created, normally results from the circumstances presented in the case, *e.g.*, from a factual showing that a state law has unduly invaded the rights of an individual or the economic freedom of a corporate personality. Such a determination is made with rationale and reason that reflects the cultural setting of the historical evolution and functional development of the institutions involved.

On the other hand, the Supreme Court is by no means an "unloosed" governmental institution created to be an arbiter of powers of government. In a recent case, Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), as an example, the legal determination that the state law was invalid was drawn from the circumstances shown by the record but resolved under the authority and in light of the legal history of the commerce clause; the state limitations on length of trains unduly interfered with the company's freedom

The litigation culminating in the historic case of *Gibbons v. Ogden* actually arose out of a series of quarrelsome associations and interchanges between Colonel Aaron Ogden and Thomas Gibbons, rather than from any ostensible political or legal conflict between the national and state governments.[151] Both Ogden and Gibbons were prominent lawyer-

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of operating the trains and subjected the railroad's property to confiscation in behalf of some vague state policy supposed to favor the safety and regularity of employment of the association of railroad workers. It was the company's freedom of operating its trains that was judicially enforced. Mr. Justice Black's dissenting opinion is erroneous, not because he thought the state law should be enforced, but because he thought the matter should be placed outside the Court's jurisdiction and authority and withdrawn from the national legal structure, except as the Congress had made freedom of the railroad to operate its properties a national policy, a contention just as applicable to rights under the first amendment.

Apparently, however, Mr. Justice Black has approved of the Court's creation of legal standards out of the commerce clause in order to enforce some private rights for some groups, as not being subject completely to the legislative prerogative. See, *e.g.*, his concurring opinion in Morgan v. Virginia, 328 U.S. 373, 386 (1946), where the Court held that segregation in bus transportation denied the individual's basic freedom of movement from place to place and freedom of association, though the opinion was stated in the outdated formalism of the state having invaded the Congress powers, apparently upon the assumption that the Congress—but not the states—had the authority to segregate in transporation. Mr. Justice Black fails to comprehend that if the Court has no jurisdiction to formulate and enforce legal principles against the injustice of confiscation of property caused by restrictions against its free and justifiable use and enjoyment, it likewise has no jurisdiction and process to formulate such principles and to enforce them against inequality. Moreover, in the deft hands of Mr. Justice Black the fundamental law of the Constitution loses its essential character of universality, for it appears to be restricted to a privileged minority.

151. Colonel Aaron Ogden was born in Elizabethtown (now Elizabeth), New Jersey, in 1756. Graduating from the College of New Jersey (renamed Princeton) in the class of 1773, a classmate of "Light-Horse" Harry Lee of Virginia and one class ahead of Aaron Burr, Ogden served in the Revolutionary War as a line officer with the 1st New Jersey regiment. He later commanded New Jersey infantry divisions in the French War preparations during 1797-1800, for which he received the title of colonel and later, in 1813, he declined appointment to major-general in the regular army, a post offered him by President Madison in the second war with England. After the Revolutionary War Colonel Ogden studied law with his older brother and became a successful attorney. A prominent Federalist in New Jersey, he was chosen United States Senator in 1801 and was elected Governor of New Jersey in 1812 on an anti-war ticket. In addition to his being a leading soldier and prominent lawyer and public person of New Jersey, Ogden was also a prominent banker and financier in Elizabethtown. But Ogden's distinctive place in history is his steamboat ferry operation and his partnership with the great steam engine builder Daniel Dod, whose engines powered Ogden's boats.

In 1812 Ogden acquired the steamboat *Sea Horse* for use in ferry service in the New York Bay between Elizabethtown Point, New Jersey, and Staten Island and other points in the Boy. Ogden's conflict with the New York steamboat monopoly, which was armed with the New York statutes and the injunctive powers of the New York Court of Chancery following the case of Livingston v. Van Ingen, 9 Johns. R. 507 (N.Y. Ct. Err. 1812), caused his bankruptcy. Ogden used his influence in New Jersey to obtain an exclusive franchise for steamboat navigation from the legislature of New Jersey. Act of Nov. 3, 1813, N. J. Laws 1811-1814, 38th General Assembly, 1st Sitting, at 61, but the New Jersey legislative attempts at reprisal were not very successful. In 1815 Colonel Ogden went to the New York legislature to plead for repeal or qualification of the New York monopoly. By this time Livingston and Fulton were both dead and those who succeeded to the interests in the franchise were made uncomfortable by Ogden's

residents of the oceanport village of Elizabethtown, New Jersey. Colonel Ogden operated his steamboat, the *Sea Horse,* and later, the *Atlanta,* be-

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pressuring. A committee of the New York legislature even went so far as to report favorably on the repeal of the franchise. In the end Ogden was able to force an assignment from John R. Livingston giving him the right to ply the *Sea Horse* in ferrying trade between the New Jersey coast and stopping points in New York. But Ogden paid heavily for the ten year assignment from the New York monopoly interests.

Terms of the assignment were reported in the pleadings in Livingston v. Ogden and Gibbons, 4 Johns. Ch. R. 48 (N.Y. Ct. Ch. 1819), when the holders of the franchise interest sued to enjoin Ogden and Gibbons from plying their respective steamboats in New York waters. Chancellor Kent denied the motion for the injunction against Ogden but entered a permanent injunction against Gibbons. John R. Livingston held exclusive rights of navigation by steamboat in the waters "from any place within the city of New York lying to the south of the State Prison, to the Jersey shore and Staten Island, viz., Staten Island, Elizabethtown Point, Amboy, and Rariton up to Brunswick, but no part or place north of Powles Hook ferry." *Id.* at 49. These were the terms of the license reassigned by John R. Livingston to Colonel Ogden on May 5, 1815, in order to secure the franchise interests from a threat of legislative repeal. Therefore when Thomas Gibbons appeared on the scene in 1817 to do battle for steamboat ferrying rights the Ogden-Dod partnership had already fought and secured the legal rights to carry on their business between points on the New Jersey coastline and points in New York City.

According to the resumé about Thomas Gibbons he was an adventurer of a Rhett Butler type. The Gibbonses lived on a plantation near Savannah, Georgia. Thomas Gibbons, who was born in 1757, was reported to have been an active loyalist during the Revolutionary War, though his father and brothers were patriots and their plantation was not confiscated. He became a leading lawyer of the state. He is supposed to have fought a duel with James Jackson over Jackson's attack against him for political corruption in the Jackson-Anthony Wayne campaign for the Congress in 1791, when there seemed to have been more votes than registered voters, resulting in the unseating of Anthony Wayne. See ANNALS OF CONG., 2d Cong. 461 (1849) [1791-1793]. Gibbons served a number of terms as mayor of Savannah and received appointment from President Jefferson to the District Court of the United States for the District of Georgia. In 1810 Thomas Gibbons purchased a summer residence in Elizabethtown in order to escape the summer heat in Georgia and later moved to Elizabethtown permanently. In 1817 Gibbons acquired a small steam ferry named the *Stoudinger,* and in 1818 he purchased another steamboat, the *Bellona.* To master the *Bellona* Gibbons hired a young Staten Islander, Cornelius Van Derbilt, then twenty-four years of age. Van Derbilt moved his family to New Brunswick and installed his wife as tavern keeper by the riverside. Van Derbilt proved himself equal to the task of eluding the agents of the New York monopoly, and the venture became very profitable.

In the meantime, the personal squabbles between Thomas Gibbons and Colonel Ogden increased in intensity. Their many difficulties are set out at random in the New Jersey court records. Thomas Gibbons was indicted for challenging Colonel Ogden to a duel with pistols but the indictment was quashed. State v. Gibbons, 4 N.J.L. 45 (1818); State v. Dayton, 4 N.J.L. 63 (1818). Colonel Ogden sued Thomas Gibbons in trespass *quare clausam fregit,* alleging the illegal challenge, and recovered from Gibbons five thousand dollars in a jury verdict. Ogden v. Gibbons, 5 N.J.L. 598 (1819), *rev'd,* 5 N.J.L. 987 (1820). The reason given for the challenge was that Colonel Ogden was said to have interfered with a domestic dispute between Thomas Gibbons and his wife. The trouble apparently began when Colonel Ogden purchased a note outstanding against Thomas Gibbons and sued him for recovery. Thomas Gibbons went to Colonel Ogden's house with a horsewhip for the purpose of physical combat; Colonel Ogden apparently left by the back door. Not finding Ogden at home, Gibbons posted the following bill upon his front door:

> To Colonel Aaron Ogden: Sir, As you refused to receive a letter which I sent you by Gen. Dayton yesterday, I will give it publicly through another channel. For like Nicanor upon Judas, you made war upon me on the Sabbath day. But first, of the letter you had received by the hands of Gen. Dayton, which is as

tween Elizabethtown Point, New Jersey, and points on Staten and Manhattan Islands under an exclusive license from the New York franchise and under an exclusive franchise granted him by the New Jersey legislature. Thomas Gibbons, on the other hand, operated his two steamboats, the *Stoudinger* and the *Bellona,* in competition with Colonel Ogden without legal authorization from either New York or New Jersey. The litigation that ensued involved the exclusion of Thomas Gibbons' steamboats from the New York waters through the judicial protection of the New York franchise.[152]

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follows: "To Colonel Ogden, Eliz., 30th May, 1816: Sir, I was this day arrested in a suit at law in your name, in the city of New York, after I was on board of the steamboat returning to Elizabethtown. As we reside within half a mile of each other and you never intimated to me or any of my friends any claims or cause of action against me, I pronounce your conduct rascally. I don't regard your suit *in terroram,* but I must teach you to proceed with decency." Copy of the letter you declined receiving by the hands of Gen. Dayton: "To Colonel Aaron Ogden, Elizabethtown, 25th July, 1816: Sir, I understand that you have interfered in a dispute between Mrs. Gibbons and myself, which has been brought on by John Trumbull and wife. My friend, General Dayton, will arrange with you the time and place of our meeting. Elizabethtown, 26th July, 1816. Thomas Gibbons"

Thomas Gibbons added a handwritten postscript to the hand bill as follows: "P. S. As you have been furnished with such a hand-bill as the above, on the first ulto., I hope you are prepared to explain yourself for your wanton interference in a case so delicate. If you stand mute I shall adjudge you as pleading guilty and treat you as a convict." Ogden v. Gibbons, *supra* at 598-99.

The only added known fact in the personal conflict over steamboat ferrying and other matters, financial or otherwise, is that when Thomas Gibbons was unable to purchase the exclusive rights in the New York waters which had been previously purchased by Colonel Ogden, he purchased secretly the exclusive rights of Daniel D. Tompkins, then Vice President of President Monroe's cabinet. The Livingston-Fulton interests rejected Tompkins' claims and the Chancellor ruled against Gibbons' claim in Ogden v. Gibbons, 4 Johns. Ch. R. 150, 154-55, 159-65 (N.Y. Ct. Ch. 1819).

152. The ensuing litigation was begun by John R. Livingston, the assignee under the original franchise of the rights to navigate by steamboat the waters south between New York and various stopping points along the New Jersey coast. Livingston's bill was filed on May 3, 1819, in which he sought to enjoin the steam ferryboat operations of Colonel Ogden as well as those of Thomas Gibbons. Livingston was operating his steamboat, the *Olive Branch,* from New York to Brunswick and was competing with Gibbons' steamboat, the *Bellona.* Chancellor Kent denied the petition of John R. Livingston for a permanent injunction against Colonel Ogden for the operation of his steamboat, then the *Atlanta.* However, the motion for permanent injunction was granted against Thomas Gibbons in so far as he or his agent Cornelius Van Derbilt operated his steamboats on the waters "in the bay of New York, or Hudson River, between Staten Island and Powles Hook." Livingston v. Ogden and Gibbons, 4 Johns. Ch. R. 48, 53 (N.Y. Ct. Ch. 1819). On the following August 14, 1819, Thomas Gibbons filed a petition for removal of the petition filed by John R. Livingston from the New York Court of Chancery to the United States Circuit Court, and for an order striking the name of Colonel Aaron Ogden from the cause because Ogden would not cooperate in the removal. Chancellor Kent denied the petition for removal on the ground that it was not timely, holding that petition for removal had to precede appearance, and suggesting that under the removal act of Congress Gibbons was not entitled to a decision in both the state and federal courts. Livingston v. Gibbons and Ogden, 4 Johns. Ch. R. 94, 97-100 (N.Y. Ct. Ch. 1819). However, the Chancellor denied John R. Livingston's petition for forfeiture of Gibbons' steamboat, the *Bellona,* filed a year later, on August 26,

Colonel Ogden initiated the litigation between himself and Gibbons by filing a bill in chancery asking for protection of the exclusive license granted him under the authority of the New York franchise, by permanent injunction and by the confiscation of Gibbons' two steamboats and all their appurtenances. Chancellor Kent granted the injunction on the day the bill was filed.[153] Almost a year later, on August 19, 1819, Thomas Gibbons filed his answer for review of the decree.[154] He presented two grounds for invalidating the New York acts granting the exclusive franchise to Robert R. Livingston and Robert Fulton. The first ground for invalidating the New York franchise on the authority of the commerce clause involved essentially the same issues which had been adjudicated

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1820, leaving the matter to be taken care of in the suit at law. Livingston v. Gibbons, 4 Johns. Ch. R. 571 (N.Y. Ct. Ch. 1820). The litigation continued, seemingly without end. On the 25th of February, 1820, the legislature of New Jersey, upon the petition of Thomas Gibbons, passed an act titled, *A further supplement to the act entitled "An act to preserve and support the Jurisdiction of this State."* Act of Feb. 25, 1820, N.J. Acts, 44th General Assembly, 2d Session 106 (1820). By this act Thomas Gibbons was entitled in the New Jersey Court of Chancery to damages by which he was aggrieved because of the injunction against him in the New York Court of Chancery. On the 6th of May, 1820, Gibbons secured in the Court of Chancery of New Jersey a permanent injunction against John R. Livingston from operating his steamboat, the *Olive Branch,* in New Jersey waters and attached and detained the *Olive Branch* at New Brunswick. See description of pleadings in Livingston v. Tompkins, 4 Johns. Ch. R. 415, 418-23 (N.Y. Ct. Ch. 1820).

153. Ogden v. Gibbons, 4 Johns. Ch. R. 150 (N.Y. Ct. Ch. 1819). Colonel Ogden's bill set out the "Prayer for an injunction to restrain defendant, his agents, &c., from using, employing, and navigating the said two steam-boats, or either of them, or any other steamboat by him . . . on the waters of this state lying between Elizabethtown, or any place within the bounds of the township, and the city of New York, &c." *Id.* at 152-53. The injunction was granted as requested.

154. Gibbons admitted the existence of the exclusive franchise granted to Robert R. Livingston and Robert Fulton by the several acts of the New York legislature and the deed of assignment to the waters in question to Colonel Ogden from John R. Livingston, but denied the exclusive right claimed by Ogden to navigate the waters from Elizabethtown Point to New York. First Gibbons contended that since his wharf in New Jersey was not situated at Elizabethtown Point, but at Halsted's Town, a short distance from Elizabethtown Point, the waters on which he operated were different waters and therefore not covered by the deeds of assignment held by Ogden. In addition, Gibbons contended that the deed of assignment did not grant Ogden exclusive rights to navigate the waters in question, because he, Gibbons, had been assigned from Tompkins:

> the right, liberty, and privilege of navigating . . . upon, over, and across the waters of the bay of New York, Staten Island sound, the outward harbour, including Prince's and Gravesend bays, and a part of the Atlantic ocean, and Jamaica bay; and, also, a right, privilege, and liberty, with all such boats so propelled [by fire and steam], to touch, stop, and land passengers, and discharge cargoes, to depart from, and arrive at the city of New York, or any part thereof. . . .

Finally, Thomas Gibbons stated in his answer that his two steamboats were enrolled and licensed to engage in coasting trade under the various acts of Congress. The *Stoudinger* was enrolled at Perty Amboy, in New Jersey, on the 23rd of October, 1817, and licensed for one year, and the license was renewed on the 20th of October, 1818, by the collector of the port of Perth Amboy. The *Bellona* was enrolled and licensed for one year in like manner on the 20th of October, 1818. Ogden v. Gibbons, 4 Johns. Ch. R. 150, 153-56 (N.Y. Ct. Ch. 1819).

finally for New York in *Livingston v. Van Ingen.*[155] The second ground, which the New York Court of Errors had not adjudicated,[156] was that Gibbons had a nationalized right to navigate the nation's public waters, rivers and lakes included, by virtue of his license under an act of the Congress which was designed to encourage and protect coasting trade and fisheries in American-owned ships.[157]

Chancellor Kent gave serious consideration to the formulation of law for the nationalizing of private rights in the freedom of navigation and the judicial enforcement of those rights by virtue of the coasting trade license.[158] Gibbons pleaded that under his license his steamboats, the *Stoudinger* and the *Bellona,* "may be lawfully employed and navigated in coasting trade between parts of the same state, or of different states, and cannot be excluded or restricted therein, by any law or grant of any particular state, or any pretense to an exclusive right to navigate the waters of any particular state by steamboats. . . ."[159] Kent dis-

155. 9 Johns. R. 507 (N.Y. Ct. Err. 1812).

156. Gibbons also alleged that even if the New York franchise was valid, he had acquired rights under that franchise by reason of an assignment from Daniel D. Tompkins and Noah Brown, assignees of the representatives of Robert R. Livingston and Robert Fulton. Chancellor Kent disallowed the grant of the franchise to Thomas Gibbons because the grant to Colonel Ogden was a prior grant, made originally in 1808 to John R. Livingston, and assigned to Colonel Ogden on the 20th of December, 1815, and because the deed to Thomas Gibbons did not grant exclusive privileges to transport passengers from Elizabethtown and New York and therefore did not interfere with the exclusive grant to Colonel Ogden. Chancellor Kent did not appear to be troubled by the transference of exclusive franchise rights under the New York statutes from points along the New Jersey coast, outside New York's jurisdiction and control, to points in New York waters. Ogden v. Gibbons, 4 Johns. Ch. R. 150, 159-65 (N.Y. Ct. Ch. 1819).

157. In *Livingston v. Van Ingen,* Chancellor Kent, then Chief Justice of the New York Supreme Court of Judicature, generally known as the New York Court of Errors, referred to the application of the supremacy clause when state legislation interfered with rights or policy under an act of Congress. According to Kent's *obiter dicta* the supremacy clause did not authorize the invalidation of state power under the Constitution unless and until there had been a prior determination of an actual conflict caused by the state act's interference with the administration of an act of the Congress. "Supremacy" could never connote "exclusive" power in the national government. 9 Johns. R. 507, 577-81 (N.Y. Ct. Err. 1812).

158. Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. In the first Congress it was enacted "That any ship or vessel built within the United States, and belonging wholly to a citizen or citizens thereof . . . shall . . . be registered, and shall obtain a certificate of such registry from the collector of the district to which such ship or vessel belongs. . . ." Such ships were entitled to a license to trade from district to district for a period of one year, and were to be allowed to pass from port to port free of manifest and the payment of import duties and tonnage fees. Act of Sept. 1, 1789, ch. 11, §§ 1, 2, 22, 23, 25-27, 1 Stat. 55; Act of Sept. 29, 1789, ch. 22, 1 Stat. 94. The above acts were amended by the Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. The registration provisions of the above acts were amended by the Act of Dec. 31, 1792, ch. 1, 1 Stat. 287. The ultimate legal issue to be determined was whether the license provisions in the above statutes constituted a judicially enforcible authorization to ply the nation's coastal waters subject to the laws of the United States.

159. Ogden v. Gibbons, 4 Johns. Ch. R. 150, 154 (N.Y. Ct. Ch. 1819). The tonnage duties for ships or vessels of the United States as determined under the registry

allowed Gibbons' legal claims under his federal license and sustained the effective application of the New York law against the allegation of interference with the rights of free navigation authorized and granted under the act of the Congress. The ultimate conclusion was that the New York statutes controlled the use and enjoyment of steamboats on all the public waters of the state.

The Chancellor's mode of determination was posited upon the legal presumption that the exclusive source of the right to possession and enjoyment of one's property was to be found in "the laws and regulations of the state."[160] Because of this legal presumption the act of the Congress was "never meant to determine the right of property, or the use and enjoyment of it, under the laws of that state."[161] An explicit invalidation of the law of the state had to be written into the act of the Congress in order to overcome this legal presumption: viz., "a provision in the act of Congress, that all vessels duly licensed, should be at liberty to navigate, for the purposes of trade and commerce, over all the navigable bays, harbors, rivers, and lakes within the several states, any law of the states creating particular privileges as to any particular class of vessels, to the contrary notwithstanding. . . ."[162]

Because the states had exclusive authority over the private rights of ownership and enjoyment of property, the private rights in the use and enjoyment of the steamboats on the waters of the state were neither increased nor diminished by the federal license. The act of the Congress had merely determined by registration that the ship was American in character, and had granted certain statutory privileges.[163] The noted

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and enrolling and licensing acts cited above were six cents per ton, paid as a license tax and not as port duties. Act of July 20, 1789, ch. 30, 1 Stat. 55, 61. Ships of foreign registry had to pay tonnage duties of fifty cents per ton for use of such ship or vessel in coasting trade.

160. Ogden v. Gibbons, 4 Johns. Ch. R. 150, 157 (N.Y. Ct. Ch. 1819).

161. Chancellor Kent explained that:

> The act of Congress (passed 18th of February, 1793, ch. 8) referred to in the answer, provides for the enrolling and licensing ships and vessels to be employed in coasting trade and fisheries. Without being enrolled and licensed, they are not entitled to the privileges of American vessels, but must pay the same fees and tonnage as foreign vessels, and if they have on board articles of foreign growth or manufacture, or distilled spirits, they are liable to forfeiture. I do not perceive that this act confers any right incompatible with an exclusive right in Livingston and Fulton. . . . The act of Congress referred to, never meant to determine the right of property, or the use or enjoyment of it, under the laws of the states.

Id. at 156-57.

162. *Id.* at 158.

163. Chancellor Kent followed the usual state-of-mind assumptions of the period that under the Constitution the nation and its member states were separate, independent governmental entities, as if the provisions of the Constitution were similar to the laws of nations and more or less a continuation of the Articles of Confederation. To illus-

Chancellor, in closing, again expressed a significant thought on the functional role of state courts in the formulation of national law from the authority of the Constitution. Kent required that the state courts be presented with something more than an exclusive coasting license before they could justifiably nullify the laws of the state, in order to formulate national law that would be binding on all the states. "We must be permitted to require, at least, the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon these laws, in direct collision and conflict, before we can retire from the support and defense of them," the Chancellor explained, and he added a coda: "We must be satisfied that *Neptunus muros, magnoque emota tridenti. Fundamenta quatit.*"[164]

The permanent injunction against Gibbons' employment of his ships in the New York waters was affirmed on appeal by the New York Court of Errors.[165] However, the New York steamboat operation had been

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trate his position, Kent discussed the copyrights and patents clause, U.S. CONST. art. I, § 8, which provides that the Congress shall have power "To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," within this framework:

> If an individual be, for instance, in possession of any duly patented vehicle, or machine, or vessel, or medicine, or book, must not such property be held, used, and enjoyed, *subject to the general laws of the land,* such as laws establishing turnpike roads and toll bridges, or the exclusive right to a ferry, or laws for preventing and removing nuisances? Must it not be subject to all other regulations touching the use and enjoyment of property, which the Legislature of the state may deem just and expedient?

Ogden v. Gibbons, 4 Johns. Ch. R. 150, 157 (N.Y. Ct. Ch. 1819). (Emphasis added.)

164. *Id.* at 159. With the *non obstante* the Chancellor delineated that:

> [T]he only question that could arise in such a case, would be, whether the law was constitutional. If that was to be granted or decided in favour of the law, it would certainly, in all Courts and places, overrule and set aside the state grant. But, at present, we have no such case, and there is no ground to infer any such supremacy or intention, from the act regulating the coasting trade. *There is no collision between the act of Congress and the acts of the state,* creating the steamboat monopoly.

Id. at 158. (Emphasis added.)

165. Gibbons v. Ogden, 17 Johns. R. 488 (N.Y. Ct. Err. 1820). Counsel for Colonel Ogden suggested that the appeal to the court of errors was "merely *pro forma,* for the purpose of having the cause carried up to the Supreme Court of the United States." *Id.* at 505. On appeal the issue emphasized was the alleged "direct collision between the authority of the United States, and that of . . . [the] state," because "in such a case, the state laws must yield to the paramount authority of the general government." *Id.* at 501-02. The issue was broadened by counsel for Gibbons, who argued that the New York franchise was in conflict with the treaties of amity and commerce subsisting between the United States and various countries of Europe. Presumably the New York legislation was as applicable to a steamboat owned and navigated by a foreign national as by an American.

The court of errors did not directly answer this latest argument, but followed Chancellor Kent in construing the enrolling and licensing acts of Congress as being restricted to establishing the national character of ships or vessels so as to impose discriminating duties upon ships navigated by nationals of foreign countries. Justice Platt explained

too profitable for Gibbons not to continue the litigation in an effort to secure its recovery under the national law formulated in the Supreme Court. Ill with diabetes, Gibbons dispatched his loyal and faithful ship-master on the *Bellona,* young Cornelius Van Derbilt, to Washington to employ counsel to appeal the cause to the Supreme Court.[166] Captain Van Derbilt engaged his assignment with his usual enthusiasm, and he made the happy choice of Daniel Webster and William Wirt, then among the recognized leaders of the bar of the Supreme Court. Webster's reputation was flushed with the acclaim of the *Dartmouth College* case,[167] and

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the act of the Congress relating to the enrolling and licensing of ships in coasting trade in the following:

> The term "license" seems not to be used in the sense imputed to it by the counsel for the appellant: that is, a permit to trade; or as giving a right of transit. Because it is perfectly clear, that such a vessel, coasting from one state to another, would have exactly the same right to trade, and the same right of transit, whether she had the coasting license or not. She does not, therefore, derive her right from the license; the only effect of which is, to determine her national character, and the rate of duties which she is to pay.

Id. at 509. Thus the license under the act of Congress (as interpreted by the New York Court of Errors) gave no right of navigating the nation's waters, and there could be no conflict between the laws of the two governments. Remaining only was the abstract question, under the commerce clause, of whether there were judicially enforceable private rights in the general freedom of movement by navigation, which had been negatived with such emphasis by the court of errors in Livingston v. Van Ingen, 9 Johns. R. 507 (N.Y. Ct. Err. 1812). Justice Platt saw no grounds upon which *Livingston v. Van Ingen* could be distinguished, and thus affirmed the court of chancery.

166. See Kendall, *Mr. Gibbons and Colonel Ogden,* 26 MICH. S.B.J. 22, 24 (Feb. 1947). David W. Kendall, Esq., has published an interesting and helpful note on the personal conflict between the two steamboat owners, out of which litigation arose in the *Gibbons v. Ogden* appeal. Some of the most interesting statements included in Mr. Kendall's note suffer from lack of documentation, yet he writes as if he were writing from authority and not from fiction, as if he had the authority in hand if he had wished to use it. One of the more interesting of the undocumented statements records that young Cornelius Van Derbilt travelled to Washington and selected Webster and Wirt as counsel to represent his employer in the *Gibbons v. Ogden* appeal in the Supreme Court. Mr. Kendall writes as follows: "From this decision, Gibbons immediately appealed to the Supreme Court the constitutional commerce clause question being raised, among others. Ill with diabetes, he sent Van Derbilt to Washington to employ counsel, with the happy result that Daniel Webster, already known for the Dartmouth College case, and William Wirt, the Attorney General, were employed." *Ibid.*

167. The Court's opinions in the *Dartmouth College* case were read on the first day of the February Term, 1819, on the morning of Tuesday, February 2. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). In result of his arguments in this case Webster's reputation had risen and he became known as the "Expounder of the Constitution." There were also the great constitutional cases of Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); and Sturgis v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) which added lustre to Webster's fame, but none replaced the *Dartmouth College* case as the most significant to Webster's place in constitutional history. See, *e.g.,* Cole, *Daniel Webster* in 19 DICTIONARY OF AMERICAN BIOGRAPHY 585, 587-88 (1943); 1 CURTIS, DANIEL WEBSTER 169-71 (1872); 1 FUESS, DANIEL WEBSTER 215, 232, 243-45 (1930); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 479-80 (1935). At the time he was selected for the *Gibbons v. Ogden* appeal, in the spring of 1820, Webster was living in Boston, having moved from Portsmouth in the summer of 1816, and was engaged in

Wirt's reputation was enhanced by his official status as the perennial Attorney General of the United States and by his appearance before the Supreme Court in a series of the early constitutional cases.[168] But Colonel Ogden was not outdone in choice of counsel to handle his side of the appeal. He retained the inimitable and hitherto unrivalled William Pinckney of Baltimore, who had been associated with Webster and Wirt as counsel for the Bank of the United States in *McCulloch v. Maryland*.[169]

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the practice of law. Though he was then not a member of the national Congress he engaged in numerous public activities including the state constitutional convention of 1820-1821. 1 FUESS, *op. cit. supra* at 197-306.

168. Wirt served twelve continuous years as Attorney General of the United States, from the fall of 1817, near the beginning of James Monroe's first term of office, until March, 1829, at the end of John Quincy Adam's term in the presidency. William Wirt had represented the government in the prosecution of Aaron Burr for treason, had been co-counsel with Webster and William Pinckney for the Bank of the United States in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and had opposed Webster and Joseph Hopkinson of Philadelphia in the *Dartmouth College* case, *supra* note 167. Wirt, with Webster, William Pinckney, and Joseph Hopkinson, was acclaimed a leader of the Supreme Court Bar. He was noted by his contemporaries for his quiet and studied eloquence in expression. In addition to his status of public counsellor, William Wirt was acclaimed by his friend Thomas Jefferson and others for his authorship. His publications, which were read widely, included THE LETTERS OF THE BRITISH SPY (1803), a series of essays on the life and times published under the title of THE OLD BACHELOR, and a well known biographic study of Patrick Henry, titled SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY (1817). See Abernethy, *William Wirt,* in 20 DICTIONARY OF AMERICAN BIOGRAPHY 418-21 (1943); KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT, vol. I, 109-23, 161-206, 295-309, 352-59, vol. II, 14-24, 28-93, 152-56, 161-70, 192-96, 207-09, 214-20, 254-329, 334-44, 370-76, 401-06, 425-49 (1848); THOMAS, *William Wirt,* in JOHN RANDOLPH OF ROANOKE AND OTHER SKETCHES OF CHARACTER 33-46 (1853); and WILLISTON, ELOQUENCE OF THE UNITED STATES, vol. IV, 394-417, vol. V, 454-503 (1827).

169. In addition to William Pinckney, Colonel Ogden selected Messrs. Thomas Oakley and Emmett, noted counsellors of New York who as loyal professionals had represented the steamboat franchise interests so often that they must have arranged their court presentations in cadence. While Pinckney gave sixteen years of his career to the foreign service and additional years to public service to his state and nation, he appeared in seventy-two cases before the Supreme Court and many considered him the greatest advocate of his time. Chief Justice Marshall proclaimed him "the greatest man I ever saw in a Court of Justice"; Chief Justice Taney once exclaimed of his fellow townsman: "I have heard almost all the great advocates of the United States, both of the past and present generations, but I have seen none to equal Pinckney"; and Justice Story added to the acclaim for Pinckney: "his eloquence was overwhelming." But William Pinckney died on February 25, 1822, exhausted by overwork while serving in the United States Senate, two years before the *Gibbons v. Ogden* appeal was brought to argument and decision. It is not being unrealistic to surmise that if William Pinckney had lived to argue for the steamboat monopoly his eloquence might have convinced at least a majority of the court to affirm the constitutional theories and statutory interpretation enunciated by Chancellor Kent in Livingston v. Van Ingen, 9 Johns. R. 507 (N.Y. Ct. Err. 1812), who incidentally, was as esteemed by the Justices of the Supreme Court of that day as is Learned Hand of the present day. See, Dolan, *William Pinckney,* in 14 DICTIONARY OF AMERICAN BIOGRAPHY 626 (1943); 1 LIFE, LETTERS AND JOURNALS OF GEORGE TICKNOR 39-41 (1876); PINCKNEY, THE LIFE OF WILLIAM PINCKNEY (1853); WHEATON, LIVES OF WILLIAM PINCKNEY, WILLIAM ELLERY, AND COTTON MATHER 3-84 (1844).

Thomas J. Oakley and Thomas A. Emmett, whom Colonel Ogden selected as co-counsel to replace the great William Pinckney, were able counsel and performed outstandingly in the *Gibbons v. Ogden* appeal, but they lacked the stature of nationally recog-

Like Wirt, Pinckney had appeared on both sides of the larger question of whether there was independent sovereignty in the nation's member states which allowed for the continual enlargement of state powers with consequential limitations upon the national powers.[170]

The appeal in *Gibbons v. Ogden* was first docketed in the Supreme

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nized constitutional lawyers of the Supreme Court Bar, a characteristic significant to the winning of constitutional cases in the Marshall Court. Oakley had been a Federalist member of the Thirteenth Congress, 1813-1815, and critic of President Madison's administration in the War of 1812. In the interim from 1815 to 1824, when he represented Colonel Ogden and the franchise in the *Gibbons v. Ogden* appeal, Oakley practiced law in Poughkeepsie and served as a Federalist leader in the state assembly. In 1819 he succeeded Martin Van Buren to the office of the attorney general of the state, from which politics caused his removal in 1821. In 1826 he was elected as a Governor Clinton Democrat congressman in the Twentieth Congress. In 1828 he was appointed to the bench in the New York courts where he remained until his death in 1857. Oakley was a member of the Kent Club, a leading Saturday night law club for legal and scientific discussions, after which "reports of champagne bottles were preferred to law reports." See THE DIARY OF PHILIP HONE 396 (Nevins ed. 1936). Professor Beveridge characterized Thomas J. Oakley as a "cold, clear reasoner, and carefully trained lawyer, but lacking imagination, warmth, or breadth of vision . . . [and] not an adequate substitute for the masterful and glowing Pinckney." BEVERIDGE, THE LIFE OF JOHN MARSHALL 423-24 (1919). See Moore, *Thomas Jackson Oakley* in 13 DICTIONARY OF AMERICAN BIOGRAPHY 604 (1943); WARREN, A HISTORY OF THE AMERICAN BAR 369, 393-94 (1911).

Thomas Addis Emmett had both sparkle and intellect. Emmett's family were Irish patriots and prominent physicians. He studied at Trinity College, Dublin, graduating in 1778, and received his doctorate of medicine from the University of Edinburgh in 1784. He practiced in Dublin and became a state physician with his father. Upon the death of his lawyer brother in 1789, he abandoned medicine and turned to the law. After study for a year in the Temple, London, he was admitted to the bar in Dublin in 1790. Emmett aligned himself with the Society of United Irishmen and very soon landed in prison, after a brilliant success at the bar. Finally he was released from the prison at Fort George in Scotland on condition he would leave the British Empire. He landed in New York with his family in November, 1804. It is a supportable conclusion that Emmett's presentations in *Gibbons v. Ogden* were on a higher intellectual and professional level than were those of either Webster or Wirt, and were considerably above those of his co-counsel Oakley. Emmett once received the acclaim of the vain William Pinckney, who had appeared against him in the Supreme Court beginning with the prize cases of the 1815 Term, and from Justice Story and others for his abilities in advocacy. See 1 LIFE, LETTERS, AND JOURNALS OF GEORGE TICKNOR 40-41 (1876); WHEATON, SOME ACCOUNT OF THE LIFE, WRITINGS, AND SPEECHES OF WILLIAM PINCKNEY 500 (1862). Beveridge's comment on Emmett also was favorable: "Not even Pinckney at his best ever was more thorough than was Emmett in his superb argument in Gibbons v. Ogden." 4 BEVERIDGE, *op. cit. supra* at 427. The thrice-told letter of William Wirt is worth repeating here:

> To-morrow begin my toils in the Supreme Court, and about to-morrow week will come on the great steamboat question from New York. Emmett and Oakley on one side, Webster and myself on the other. . . . Emmett's whole soul is in the cause, and he will stretch all his powers. Oakley is said to be one of the first logicians of the age; as much a Phoecion as Emmett is a Themistocles; and Webster is as ambitious as Caesar. He will not be outdone by any man, if it is within the compass of his power to avoid it. . . .

2 KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT 164 (1849). See also Hicks, *Thomas Addis Emmett* in 6 DICTIONARY OF AMERICAN BIOGRAPHY 145 (1943); WARREN, A HISTORY OF THE AMERICAN BAR 262, 280-84, 301-03, 368-69, 393, 397 (1911); Hall, *Thomas Addis Emmet*, 8 GREEN BAG 273-79 (July, 1896).

170. 4 BEVERIDGE, THE LIFE OF JOHN MARSHALL 413 n.4 (1919).

Court on June 7, 1820, but was dismissed in the February term of 1821 because the record had failed to show explicitly whether the affirmance in the New York Court of Errors was a final decree.[171] The appeal was refiled on January 10, 1822, and the case was continued at each succeeding term until finally it was set down for argument at the beginning of the February term in 1824.[172] The long delay of four years was extremely irksome to lawyer Thomas Gibbons, whose two-steamboat passenger line was inoperative subject to the permanent injunction on the authority of the New York decree. Gibbons is reported to have written his chief counsel Webster urging him to do everything in his power to hasten final decision on his appeal, for "this section of the Union is extremely agitated from the impositions and actions of that proud state, New York."[173] In final desperation he dispatched to his associate counsel William Wirt the following: "I entreat you to press trial or death will take from me the pleasure of rejoicing in the event."[174] Thomas Gibbons lived to "rejoice in the event" of his anticipated victory. The Supreme Court reversed the decree of the New York Court of Errors on March 2, 1824, and remanded the cause for the final determination of withdrawal of the permanent injunction. Soon after the memorable event, shipmaster Cornelius Van Derbilt steamed the *Bellona* alongside the landings at New Brunswick amid cannon salutes and shouts by "citizens desirous of testifying in a public manner their good will."[175] Gibbons could now employ the *Bellona* and *Stoudinger* in navigating the waters of New York. The private rights of the entrepreneur had been made a part of the structure of the national law, and with judicial enforcement had come the freedom of the individual to enjoy the economic benefits in the rapidly advancing technology of the steam engine.

Even at this late date, from the vantage point of more than a century of judicial formulations from the authority of the commerce clause accompanied by the critical analyses of able commentators, the decision and decree in *Gibbons v. Ogden* continues to be extremely complex. The complexity follows from the supposed necessity of using the authority of the commerce clause to invalidate the law of the state in order for the

171. In the February Term, 1821, on the 21st of March, the Court dismissed the appeal upon the technical ground that the record did not show that the decree of the New York Court of Errors was a final decree in compliance with § 25 of the Judiciary Act of 1789 ch. 20, 1 Stat. 73. Gibbons v. Ogden, 19 U.S. (6 Wheat.) 448 (1821); 4 BEVERIDGE, *op. cit. supra* note 170 at 413. Presumably the record was corrected. For a contemporary note on the Court's motions of its jurisdiction under the 25th section of the Judiciary Act see Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 206-09 n.a (1822).

172. 4 BEVERIDGE, *op. cit. supra* note 171, at 413.

173. See Kendall, *Mr. Gibbons and Colonel Ogden*, 26 MICH. S.B.J. 22, 25 (1947).

174. *Ibid.*

175. *Ibid.*

Supreme Court to exercise its judicial powers under the Constitution.[176] Constitutional adjudication from the authority of the commerce clause was a two step process. Declaring the act of the state void was the first step, and constituted jurisdictional authority for the second step. In the second step there was formulated the national law as the substantive basis for the judicial enforcement of private rights or personal liberty which had been abridged by the state authority. Generally, however, the judicial enforcement of the private rights or personal liberty abridged by the state authority was made to appear to follow directly from the process of voiding the state law. The legal authority for the judicial enforcement of private rights or personal liberty, while inferred from the authority of the commerce clause, under which state law was invalidated, was in no sense limited to the commerce clause or even to the bounds of the Constitution for that matter. Authority for this more essential adjudicative national law was related to the institutional development of the common law legal system of England and the United States, and to the evolving needs of the American community. Timely needs of the society and the traditional legal precedents for recognition of private rights have often provided unstated justifications for invalidating state law upon the constitutional authority of the commerce clause.[177]

176. The doctrinal difficulties caused by counsel's presentations and the opinion of the Court in *Gibbons v. Ogden* involved the intermixing of national powers with state powers, as if the presentment of the validity of state powers inevitably involved the scope and definition of national powers. Actually the scope and definition of national powers "to regulate" commerce, as shown in the opinion of the court in McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316 (1819), were matters for legislative determination whenever the Congress was called upon to exercise such powers. The scope and validity of national powers would not be subject to judcial review except in judicial enforcement of the policy of the national government resulting from the exercise of those powers. Professor Ribble has delineated *Gibbons v. Ogden* as determining "what is commerce" and "the effect of the federal power on the powers of the states." By making commerce subject to abstract legal definition the court by formulation of law imposed abstract limitations upon the powers of the Congress when such powers had not been exercised and the validity of their exercise was not in issue. See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 20-52 (1937). Mr. Prentice thought that the legal questions were just about what they—counsel and the court—said they were, the nature of the federal commerce power, being exclusive and withdrawn from the states, and thus very limited and applicable only to coastwise navigation. See PRENTICE, FEDERAL POWER OVER CARRIERS AND CORPORATIONS 59-100 (1907).

177. Stated differently, the Supreme Court has had to turn to the commerce clause as well as the authority in judicial review and the supremacy clause in order to secure the requisite jurisdictional authority which we have demanded of it, and which was not given it under the laws of the United States "by Article III." The process of judicial review and the judicial enforcement of private rights is somewhat analogous to the legal process of declaratory judgment plus mandatory injunction in equity. The jurisdictional authority of the commerce clause has been available when there was need for the nationalization and judicial enforcement of private rights in freedom of movement, association, discrimination, and freedom to do business.

Finally, in their historic and evolutionary pattern, the commerce clause cases involve something more than judicial review and the judicial enforcement of the commerce

The great Declaration and the War for Independence separated the ostensible constitutional ties from the ancestral state with the consequence that the deeper, inostensible cultural ties became more inseparable. These cultural ties, which included the English common law, provided the authority for the making of private rights the basis for the formulation of national law. That the end result of the decision-making process for determining national law is referred to as constitutional law should not confuse us. This merely comprehends that the jurisdictional authority to make the adjudication was based on the Constitution, treaties and laws of the United States. Thus the appeal in *Gibbons v. Ogden* did not directly involve the scope of the national powers derived from the commerce clause. And it was not a part of the law formulation function for the Supreme Court to make abstract determinations of the scope of national powers in the sense of a judicial determination not based upon an act of the Congress.[178] What was determined in the *obiter dictum* portion of the Marshall opinion, concerning the nation's political and legal structure under the commerce clause, was that the judicial authority could be drawn from the Constitution as well as from the act of the Congress for the judicial determination and enforcement of private rights.[179] The legal question presented and determined was that the private rights in the use of steamboats had to be nationalized in order to secure them against arbitrary state interference. In *Elkison v. Deliesseline* the ostensible authority for the legal formulations in recognition of the universal rights of the free negro was derived from the commerce clause in the Constitution.[180] Actually the more basic and compelling judicial authority was to be found in the legal principles of the common law. In each case national law was created to make private rights judicially enforcible from

clause. Included also in the mandate is the judicial enforcement of the private rights against state authority. Later legal standards for violation of the commerce clause require legal injury to the private rights enforceable in the freedom to do business, to associate, and to move nationally across state lines. See, *e.g.*, H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Edwards v. California, 314 U.S. 160 (1941).

178. It was presumed that the jurisdictional authority of the Court to use the commerce clause to invalidate the state franchise did not extend beyond Congress' powers to regulate commerce. This proposition was open to question, yet it did not follow that the Congress necessarily had the constitutional authority to create the same exclusive franchise in New York or a similar franchise in other states. The most the Court required of itself was to speculate, somewhat vaguely, about Congress' authority to regulate, at random, ships and passengers navigating on public waters. Significantly the court rejected the arguments made by counsel for the franchise that Congress' authority did not reach random regulations relating to public waters located within the borders of a single state. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-209 (1824).

179. *Id.* at 209-22 (1824). See also, FRANKFURTER, THE COMMERCE CLAUSE 16, 18-19 (1937).

180. 8 Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823).

unlawful invasions declared to result from the functioning of state powers. It was not of great import that the authority of the Supreme Court's lawmaking was an act of the Congress in the one case and the constitutional provision for the regulation of commerce in the other. The significant factor in each case was the recognition of the jurisdictional authority needed to enforce the private rights which had been confiscated or abridged by the functioning of the state law. The interference from the over-extension of state powers created the necessity for the legal conclusion of abridgment and the nationalizing of private rights in the freedom of movement by navigation upon the public waters of a member state.

Influences on the Court's determination in *Gibbons v. Ogden* are not subject to quantitative measurement but they may be speculated upon nonetheless. The judicial determination was not made solely because the Court considered that fundamental private rights in the freedom of movement by navigation had been abridged. Neither was it the result of well defined, suppositional beliefs in a general freedom of commercial intercourse in opposition to the restrictions of the state created franchise. The ideas that transformed the British society from the feudal structure, so happily generalized in Adam Smith's *Wealth of Nations,* were still awaiting later fusion into the cultural patterns of the American community. Exclusive franchises were the order of the day. Normally they were enforcible under the state law of vested rights of property, which Chancellor Kent thought to be in the social interest, attracting available private capital to the public good.[181]

The determination of the Marshall court in *Gibbons v. Ogden* reflected the elemental ideas of the constitutional period which were influential in the creation and adoption of the Constitution. Those ideas were expressed in the words of the preamble as being the reasons for the Constitution: ". . . in Order to form a more perfect Union, establish Jus-

181. In his opinion for the *Livingston v. Van Ingen* appeal to the New York Court of Errors, Chancellor Kent expressed himself upon the usefulness of the exclusive franchise as follows:

> And permit me here to add, that I think the power has been wisely applied, in the instance before us, to the creation of the privilege now in controversy. Under its auspices the experiment of navigating boats by steam has been made, and crowned with triumphant success. . . . From this single source the improvement is progressively extending to all navigable waters of the *United States,* and it promises to become a great public blessing, by giving astonishing facility, dispatch and safety, not only to travelling, but to the internal commerce of the country. . . . So far from charging the authors of the grant from being rash and inconsiderate, or from wishing to curtail the appellants of their liberal recompense, I think the prize has been dearly earned and fairly won, and that the statutes bear the stamp of an enlightened and munificient spirit.

9 Johns. R. 507, 585 (N.Y. Ct. Err. 1812).

tice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity. . . ." It was for the preservation, and perhaps also for the effectuation of the nationalized political structure that the Court enforced Gibbons' freedom of navigation on the nation's waters, for it was thought that the acts of the state in creating the exclusive franchise had the consequence of pulling down the newly-created constitutional structure of the national government.[182] To preserve the national government it was necessary to channel the state powers under a rule of law formulated by the decision-making of the nation's highest Court. This was reflected in the presentations of counsel Webster and Wirt and in the portion of the Court's opinion containing the pronunciamentoes of Chief Justice Marshall on the meaning of the nationalization of the powers of government, particularly those powers over commerce.[183]

Each counsel organized his presentations around the concept of ex-

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182. See Chief Justice Marshall's rejection of counsel's suggestion of a rule of strict construction of the national powers incorporated in the Constitution, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187-88 (1824). In this context Mr. Justice Johnson discussed the purpose of the Constitution, both as an aid to construction and as a means of emphasizing the need for preservation of the Constitution:

> The great and paramount purpose, was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the states, that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic.

Id. at 223. Thus, according to Mr. Justice Johnson, a crucial purpose underlying the nationalization of governmental powers was to preserve the member states, by preserving order and harmony between the member states and between the peoples thereof.

183. *E.g.*, Mr. Webster argued:

> A power in the states to do anything and everything, in regard to commerce, till Congress shall undo it, would suppose a state of things at least so bad as that which existed before the present constitution. It is the true wisdom of these governments to keep their action as distinct as possible. The general government should not seek to operate where the states can operate with more advantage to the community; nor should the states encroach on ground which the public good, as well as the constitution refers to the exclusive control of Congress.

Thus there had to be lines drawn by legal definitions which separated and made independent the powers of the national government from the powers of the member states. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 16-17 (1824). See also, Chief Justice Marshall's adumbration:

> In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting powers must arise. Were it even otherwise, the measures taken by respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

Id. at 204-05.

clusive versus concurrent powers. To employ the legal concept of exclusive versus concurrent powers was to determine whether to enforce national or state powers in a given case. Thus it was natural for counsel to transform the legal concept into a rule of constitutional law which would enforce national powers against state powers, or into a rule of constitutional law which would grant recognition to the continual expansion of state powers. It is useful, therefore, to explore further into the origins and meaning of the concept in order to more fully understand counsels' presentations.

The commonly accepted notion that the Constitution created a national government composed of two categories of powers, exclusive and concurrent, apparently arose out of the historic conflict over the confirmation of the Constitution in the various state conventions. Patrick Henry attacked the Constitution on the grounds that the powers of the national government were to be administered and enforced, if need be, against the people directly.[184] He used the powers to tax to show that the power to levy and collect taxes directly against persons, and upon their property and activities, inevitably would destroy the member states and the people's liberties.[185] Most of Patrick Henry's attacks on the Constitution were based upon his ultimate conclusion that the Constitution had created what he called a "consolidated" government.[186] In designating the national government as consolidated, Henry described a political structure in contrast to that which existed under the Articles of Confederation, and in contrast to a system in which there would have been sharp division of powers between the national government and the governments of the member states.

Henry's broad charge that the Constitution created a national government was not answered in the Virginia convention by James Madison

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184. Henry said:

> I would make this inquiry of those worthy characters [not gentlemen] who composed a part of the later federal convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That this is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand,—what right had they to say, *we, the people?* My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of, *we, the people,* instead of, *we, the states* . . .?

3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 22 (1836). Later, Mr. Henry argued that "it is now confessed that this is a national government. There is not a single federal feature in it. . . . The most essential objects of government are to be administered by Congress. . . ." *Id.* at 395-96.

185. See 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 321-28 (1836); and see Mr. Madison's answer, *id.* at 328-29.

186. See ELLIOT, *op. cit. supra* note 185.

and his coterie of supporters of the Constitution.[187] It was extensively dealt with in the thirty-second number of *The Federalist* papers, however, where the writers all but propagandized away the independent supremacy of the political and legal structure of the national government under the Constitution.[188] This was understandable, for it was con-

187. In answering his friend, the illustrious George Macon, Mr. Madison concluded without explanation "[W]ith respect to converting the confederation to a complete consolidation, I think no such consequence will follow the Constitution, and that, with more attention, we shall see that he is mistaken. . . ." 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 34 (1836). In general, the arguments in favor of the Constitution took the form of listings of the ostensible inadequacies of the confederation in regard to control of internal security, and of the total inadequacy of the confederacy with regard to foreign affairs. The United States was unable to take its place in the late eighteenth century world which was controlled by powerful nation states each vying for domination. See, *e.g.*, Mr. Madison, *id.* at 86-97.

188. THE FEDERALIST No. 32 was drafted by Mr. Hamilton and published in the Independent Journal, Jan. 2, 1788; the original essay also appeared in The Daily Advertiser, Jan. 3, The New-York Packet, Jan. 4, and The New-York Journal, Jan. 8. It was designated as number 31 in the newspapers. In this essay, addressed *To the People of the State of New York,* Mr. Hamilton gave the following instructions:

> An entire consolidation of the States, into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.* I use these terms to distinguish this last case from another which might appear to resemble it, but which in fact be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified in the following instances . . . The third will be found in that clause, which declares that Congress shall have power "to esablish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE there could not be a UNIFORM RULE. . . .
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> The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union, remain with them in full vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act which justifies the

sidered that nationalization of powers immediately and automatically withdrew powers of government from the member states. Thus to admit to Henry's charges meant that the Constitution would not be adopted. The Constitution's supporters did not comprehend that the existence of powers in the national government did not require any automatic alienation or suspension of state powers. And neither did they comprehend that it was not only unnecessary but impractical to require by judicial determination and decree what they called "alienation of state powers" in order to construct and secure the nationalized government of the United States. In the propaganda of *The Federalist* papers the Constitution was made out to create at one and the same time both a consolidated and a federal government—a "mixed" government, the authors said. It was consolidated to the extent that the states were barred from the objects of some of the national powers—those referred to as exclusive—and the government was federal to the extent that other national powers continued in the member states until withdrawn by legislation enacted by the Congress—those powers referred to as concurrent. Three definitions or categories were given to the concept of exclusive powers, the general acceptance of which Webster equated to "well-settled rules of construction."[189] Exclusive powers were said to arise from the use of words in the Constitution comprehending unitary authority in the national government, from explicit prohibitions imposed upon the powers of the states, and from the nature of the subject matter of powers delegated to the national government. The main conflict over the concept of exclusive versus concurrent powers arose within the third category, from the nature of the subject matter.

Presentations made by counsel tended to becloud the essential legal questions of whether the circumstances of the case required the formulation of national law for the enforcement of private rights. Instead it appeared as if it were a principal function of the judicial prerogative to formulate the national law from the authority of the Constitution in order to divide the whole of the nation's powers of government over commerce and trade and general welfare between the national government and the member states.

VI. Gibbons v. Ogden—Counsel's Presentations

The presentations of Webster and Wirt were devised as legal grounds for invalidating the state-created franchise. Their presentations

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position I have advanced, and refutes every hypothesis to the contrary. [Signed "Publius."]

The Federalist No. 23, at 186-89 (Lodge ed. 1888).

189. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 10 (1824).

were mostly concerned with theories about the Constitution, emphasizing the unitary sovereign nature of the national government vis-à-vis the nation's member states and the unitary nature of the commerce powers of the national government. They posited their presentations upon an ultimate conclusion that the powers of government in the Congress were intended to constitute the unitary powers of a sovereign nation. Such powers had to be exclusive in the Congress in order to be withdrawn from the member states. The alienation of commerce powers from the member states was required in order to provide for the judicial enforcement and the nationalization of private rights under the authority of the commerce clause of the Constitution.[190]

Webster's arguments were formulated more broadly. His arguments were based largely upon the implications which he drew from the political history and process of structuralizing the national government.[191] The presentations of Mr. Wirt, on the other hand, were restricted to the application of the supremacy clause to the acts of the Congress, enacted under the authority of the patent and commerce clauses of the Constitution. Mr. Wirt did not attempt to extend his arguments to the adjudicative formulations of national law from the independent authority

190. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9-10, 14, 21, 24 (1824). Webster's main emphasis was one of necessity as to the nature of commerce as powers of government; involved was the commerce of the national government, under the sovereignty of the national government. It was Mr. Justice Johnson who related the powers of the national government to sovereign powers under the law of nations. *Id.* at 227. The somewhat hidden purpose of Webster's arguments ought to be kept in mind; like the legal argument under the first amendment in the present day, the main purpose of Webster's arguments was to nationalize judicial authority in the Supreme Court, in order to require the Supreme Court to enforce the powers of the national government. If the national powers were exclusive they were invaded by the state franchise, and the legal rights of lawyer Gibbons also were abridged.

191. The essential purpose of the Constitution, according to Webster, was to right the wrongs created by state sovereignty over the powers of commerce. There was no time to wait for legislative acts of the Congress limiting, modifying, and withdrawing state controls. The withdrawal of state controls had to be axiomatic and immediate with the existence of the Constitution, and thus the function of the Supreme Court was to effectuate these enormous consequences in the name of the Constitution by freeing commerce whenever the member states failed to accept voluntarily the process of abstract nationalization. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 12-22 (1824). According to the case reporter, Webster expressed the following, in substance:

> We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general concurrent power, in the regulation of foreign and domestic trade, as still residing in the states. The very object intended, more than any other, was to take away such power. If it had not so provided, the constitution would not have been worth accepting. He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several States to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be exclusive. . . .

Id. at 13-14.

of the Constitution, or to the adjudicative formulations from the authority of the common law, as did Webster.[192]

It was only in the alternative that Webster relied upon the law to be formulated from the acts of the Congress for regulating the coasting trade.[193] His main contentions initiated a process of interpreting the various clauses of the Constitution by reference to those historic theories of constitutional structure which reflected nationalized powers in the general government. The judicial authority drawn from such nationalized powers of government necessarily required the Court to invalidate the state acts and thus allowed it to reverse the state decree and enforce the private rights of his client to navigate freely by steamboat over the public waters of New York. Understandably, Webster had declined to argue the cause "on any other ground than that of the great commercial question presented by it—the then novel question of the constitutional authority of Congress exclusively to regulate commerce in all its forms on all navigable waters of the United States . . . without any monopoly, restraint, or interference created by states' legislation."[194]

The conclusive nature of Webster's presentations may be explained by the fact that the evolution of the Court's role in constitutional adjudication was in the initial stages. While the breadth of Congress' authority

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192. "The Attorney-General . . . in reply, insisted, that the laws of New York were unconstitutional and void: 1. Because they are in conflict with powers exclusively exercised, by laws now subsisting and in full force. 2. Because, if the powers be concurrent, the legislation of the State is in conflict with that of Congress, and is, therefore, void." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 159 (1824). Attorney General Wirt also argued:

> If Congress, in the lawful exercise of its power, says that a thing shall be done, and the State says it shall not; or which is the same thing, if Congress says that a thing shall be done, on certain terms, and the State says it shall not be done, except on certain other terms, the repugnancy has all the epithets which can be lavished upon it, and the State law must be void for repugnancy.

Id. at 161-62.

193. The reporter has Webster stating, in substance, as follows:

> But, he contended, in the second place, that whether the grant were to be regarded as wholly void or not, it must, at least, be inoperative, when the rights claimed under it came in collision with other rights, enjoyed and secured under the laws of the United States; and such collision, he maintained, clearly existed in this case. It would not be denied that the law of Congress was paramount. The constitution has expressly provided for that. So that the only question in this part of the case is, whether the two rights be inconsistent with each other. . . .

Id. at 27.

194. Quoted in 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 601-62 (rev. ed. 1947), but without citation of authority. See also HARVEY, REMINISCENCES OF DANIEL WEBSTER 140-43 (1877), in which he recalls Webster's reminiscing that he and Mr. Wirt upon consultation about the case found that their differences on the legal principles upon which the case should be argued were such that Mr. Wirt had suggested that "each argue it in his own way, and we will find out which, if either, is right." *Id.* at 142. Mr. Webster is quoted as having informed Mr. Wirt that "the clause of the Constitution which ceded to the general government the right to regulate commerce was that upon which I based my defense." *Id.* at 141.

to regulate commerce—whether exclusive or otherwise—was not in issue, Webster brought the scope of the national powers in issue via the authority of the Supreme Court to interpret the great clauses in the Constitution. The ultimate legal issue was whether the circumstances of the case required the formulation of national law for the judicial enforcement of private rights in the freedom to navigate by steamboat upon the public waters of a member state. If such rights were abridged by a member state, then and only then was the question presented whether there was authority in the Constitution for the judicial invalidation of the state acts in order to reverse the state decree. But Webster transposed these legal issues. The requisite authority to invalidate the state-created franchise dominated his presentations, as if the authority to invalidate the acts of the state from the authority of the commerce clause absolutely required the judicial enforcement of private rights as a part of national law. Actually, judicial determination that the circumstances of the case constituted an abridgment of private rights by a member state required the formulation of national law protecting Gibbons' right to navigate his steamboat upon public waters. Thus, the abridgment of private rights existing in the freedom of movement by navigation required the constitutional invalidation of the state franchise, but in general the breadth of state powers required to be invalidated was limited to the breadth of the national law required for the judicial enforcement of the freedom to navigate by steamboat.[195]

Webster began his formal presentations in *Gibbons v. Ogden* by emphasizing the special role of the judiciary in preserving the Constitution. It was to this end that the commerce clause had to be transformed into a rule of national law. He instructed the Supreme Court "that the power of Congress to regulate commerce was complete and entire, and, to a certain extent, necessarily exclusive; that the acts in question were regulations of commerce, in a most important particular; and affecting it in those respects, in which it was under the exclusive authority of Congress."[196] He was not prepared to say that "all [state] regulations which might, in their operation, affect commerce" were absolutely necessary to the nation's sovereignty, and thus had to be exclusive in the Congress

195. It was not because the state regulated commerce and/or invaded the powers of the Congress that national law had to be formulated in order to subject the state law to constitutional invalidation. Rather it was because of the consequences of the state-created franchise upon the freedom and interests of persons from other states. The circumstances Gibbons brought to the Court were not covered by the privileges and immunities clause of article IV of the Constitution, as the residents of New Jersey and those of New York were treated alike. Thus the commerce clause had to be brought into play as the nationalizing article of the Constitution.

196. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9 (1824).

and withdrawn from the states.[197] "Nothing is more complex than commerce," Webster opined; "no words embraced a wider field than commercial regulation. Almost all the business and intercourse of life may be connected, incidentally, more or less, with commercial regulations."[198] In the main it was "the higher branches of commercial regulations," which invaded the nation's sovereign powers, that had to be "exclusively committed to a single hand."[199] Thus "the constitution [was] never intended to leave with the States the power of granting monopolies, either of trade or navigation; and, therefore, that as to this, the commercial power was exclusive in Congress."[200] Such regulations of a member state were destructive of the Constitution and the existence of the national government created by it.

Webster might have added to his objection that the state franchise was destructive of the powers of the Congress and the Constitution the more basic contention that the state regulations restricted the commercial and general intercourse which, under the law of nations, was intended to be free except as regulated during a state of war or legitimately under a treaty made between independent states. Mr. Justice Johnson, who was cognizant of this more basic contention, used his concurring opinion to theorize on the relationship of the freedom of commerce to the law of nations. Johnson insisted that the great objects of government, which were recognized by the power to regulate commerce, were intended by the Constitution to include the fullest powers of a sovereign nation-state as recognized under the law of nations. There could be no division of such sovereign powers between the national government and the member states. "The definition and limits of that power," Johnson explained, "are to be sought among the features of international law. . . ."[201] Thus, so long as the freedom of movement by navigation remained "unaffected by a state of war, by treaties, or by municipal regulations, all commerce among the independent States was legitimate."[202] For this principle of government there was no necessity "to appeal to the oracles of jus commune"; the law of nations had "pronounce[d] all commerce legitimate in a state of peace, until prohibited by positive law. . . . And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant

197. *Ibid.*
198. *Id.* at 9-10.
199. *Id.* at 14.
200. *Id.* at 10.
201. *Id.* at 227.
202. *Ibid.*

of this power carries with it the whole subject, leaving nothing for the State to act upon."[203] Upon this analysis, the power to regulate those "higher branches" of commerce, which were said by Webster to be involved in the *Gibbons v. Ogden* appeal, corresponded to the war and treaty-making powers of the national government.

What was to be regulated, according to Webster, was "the [unitary] commerce of the United States" and not "the commerce of the several states."[204] "Henceforth," after the Constitution, "the commerce of the States was to be an *unit;* and the system by which it was to exist and be governed must necessarily be complete, entire, and uniform. Its character was to be described in the flag which waved over it, *E Pluribus Unum.*"[205] The theory of exclusive powers thus required the Supreme Court to invalidate the state law from the authority of the Constitution. The judicial enforcement of the private rights of his client to navigate by steamboat upon the public waters of New York followed more or less as a consequence, as a by-product. No special emphasis neded to be given the abridgment of private rights; what was nationalized was free, under the authority of the Constitution. The nationalization of commerce secured the freedom of movement by navigation upon public waters.

Webster's constitutional arguments made in the Supreme Court were like those which he made in the halls of the Congress. They were not closely reasoned. But his arguments were carefully prepared, and they evolved into a logical structure. In his arguments in the *Gibbons v. Ogden* appeal he maintained a logical pattern of broad generalizations. The thread of exclusive powers in the national government, with the resulting alienation of state powers, was maintained through each generalization. His ultimate conclusion justifying the invalidation of the state franchise, and the judicial enforcement of Gibbons' right of navigation, was supported by the language of the Constitution and by the subject matter of commerce and general intercourse between peoples of the member states.[206] Additional support was to be found in the intent and purpose of the general words of the commerce clause as shown in selected references which he made to the political and administrative history proximate to the creation and adoption of the Constitution.[207] And, finally, much was made of the disruptive forces inherent in the division of powers between the national government and the member states and specifically

203. *Ibid.*
204. *Id.* at 14.
205. *Ibid.*
206. *Id.* at 10-11, 13-14.
207. *Id.* at 11-13.

in the continuation of concurrent powers in the states to regulate commerce.[208]

Webster's conclusions constituted an interpretive process for determining the legal meanings to be given to the language of the Constitution.[209] The workings of the interpretive process were not complex; it was required only that those "well settled rules of construction" be applied. "Some powers are holden to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the states to exercise similar powers; and others, again from the nature of the powers themselves."[210] But it was the nature of matters of great commercial concern—like the grant of monopolies in trade or commerce—which required a unitary system of regulations. This nature of great commercial concern was to be found in the consequences of the exclusive franchise; New York had closed her ports to all but her own citizens, refusing admission even to ships of other nations as well as to those from the other states.[211] If it could be assumed that any government could regulate with such sweeping consequences, the power should rest only in the Congress.[212]

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208. *Id.* at 15-25.

209. Perhaps it is not inappropriate to suggest that, for Webster, the judicially administered interpretive process which he advocated and influenced was guided, if not propelled, by subjective conclusions entertained and arrived at independently of the language of the Constitution. In addition, the meanings of the Constitution appeared to be abstracted from the general theories about the Constitution, and were unrelated to the circumstances of the case and the particular interests of Webster's client.

210. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 10 (1824).

211. *Id.* at 16.

212. There is no question but that the impact of the New York statute conflicted with general principles of law relating to the freedom to navigate on public waters, including the freedom of movement and the basic freedom in the use and enjoyment of property. The essential problem was not the authority of the Supreme Court to formulate these general principles as national law. The freedom of navigation on public waters being a principle of the law of nations, and thus binding upon the national government, was the authority for the formulation and enforcement of such a principle. The Court's authority to formulate the general principles relating to freedom of navigating upon public waters was thought to depend upon the authority in the Constitution to invalidate the state acts that conflicted with the general principles of law referred to.

Article IV was inappropriate for such authority unless expanded beyond its literal wording to include general basic rights as part of national law. In wording, the privileges and immunities clause prohibited the states from discriminating against citizens of other states. But the reach of the exclusive franchise was as burdensome on residents of New York as on residents from other states and on vessels from foreign countries. Thus the discriminatory consequences of the exclusive franchise were general and operative upon anyone operating a steamboat upon public waters over which New York had assumed jurisdiction. While the contract clause may have been violated in the original grant to Robert Fulton, because of the revocation and confiscation of the original grant to John Fitch, such a violation did not carry over to Thomas Gibbons and to other steamboat owners. Preservation of the basic rights of property was not then a part of the Bill of Rights amendments as authority for the judicial formulations of national law in this area.

Next Webster turned to the legislative and administrative history of the making of the Constitution, proving that the intent and purpose behind the Constitution supported his position. He referred to the unhappy experiences under the Articles of Confederation, and to what was portended by the events and forces which were reflected in the inevitable movement toward the creation of a new governmental structure, whose powers were nationalized and independent of control by the member states.[213] The leading state papers, according to Mr. Webster, showed that the movement toward the Constitution was driven forward by the great objects of commerce and revenue, which were "indissolubly connected."[214] The new government was created in order to rescue the commerce of the nation "from the embarrassing and destructive consequences, resulting from the legislation of so many States, and to place it under the protection of a uniform law."[215] Webster had represented the interests of New England in the Congress, first New Hampshire and then Massachusetts, and his discussion of the making of the Constitution reflected the collective political-economic interests of the merchant and maritime interests of the new government.[216] The maritime interests wanted governmental authority nationalized for use in combating the monopolistic policies of British shipping, and the merchant interests were anxious for tariff protections for their expanding manufacturing.[217]

Webster's statement of his reliance upon the steps in the making of the Constitution was brief. He justifiably presumed that the members of the Supreme Court were as aware as he of the legislative and administrative history through which all had lived. He began his listings of the political and administrative history in support of the nationalization of power over commerce with those historic resolutions which New Jersey had attached to her confirmation of the Articles of Confederation. New Jersey had complained that "the regulation of trade seems to be committed to the several states within their separate jurisdictions, in such a degree as may involve many difficulties and embarrassments, and be attended with injustice to some states in the union. . . ."[218] New Jersey had urged that "the sole and exclusive power of regulating trade of the

Thus it was thought that the commerce clause and possibly some of the other general grants of powers in the Constitution had to provide the requisite authority for the formulation of national law in the judicial enforcement of private rights.

213. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 11 (1824).

214. *Ibid.*

215. *Ibid.*

216. 1 FUESS, DANIEL WEBSTER 147, 197-214, 307-38 (1930).

217. JENSEN, THE NEW NATION—A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789, 399-407 (1950).

218. 11 JOURNALS OF THE CONTINENTAL CONGRESS 648 (Ford ed. 1908).

United States with foreign nations, ought to be clearly vested in the Congress. . . ."[219] Webster recalled the proposal of New Jersey's revered statesman, Mr. John Witherspoon, whose presentations to the Continental Congress on the 3rd of February, 1781, stated "that it . . . [was] indispensably necessary that . . . [the Congress] be vested with a right of superintending the commercial regulations of every state, that none might take place that should be partial or contrary to the common interest."[220] Next Webster recalled the report of the Monroe Committee which was filed in the Continental Congress on March 28th, 1785, by which it was recommended that the Congress propose an amendment to the Articles of Confederation for constructing perpetual and exclusive powers in the Congress to regulate trade, and the powers to be delegated for the regulations of foreign and domestic trade were to include the explicit authorization to levy imposts and duties on imports.[221] Webster

219. *Ibid.* New Jersey's complaints and recommendations about the need for a national power over commerce were rejected by the Congress sitting on Thursday, June 25, 1778, by three ayes, six noes, and one divided, which fact Webster did not include in his argument. 11 JOURNALS OF THE CONTINENTAL CONGRESS 651 (Ford ed. 1908). Possibly he did not consider Congress' rejection pertinent to the legislative and political history in the making of the Constitution. The action by the Congress may have been taken, at least partially, because if any such amendments had been enacted no confederation could have taken place for months or years and quite possibly would never have taken place. New Jersey made other recommendations in its resolution, such as the requirement of a constitutional oath to be taken by the Congress of the United States and the recognition of alien property as common property of all the state, a most touchy subject. *Id.* at 648, 649-50. Other states proposed numerous amendments in consequence of their respective complaints. See, *e.g.*, Maryland, *id.* at 631-32, 636-37; Massachusetts Bay, *id.* at 638; Rhode Island and Connecticut, *id.* at 638-40; New York, which conditioned its confirmation of the Articles with a proviso that they shall not be binding on the state until all the other states in the union ratify the same, *id.* at 640; and Pennsylvania and South Carolina which followed with various complaints and recommendations, *id.* at 652-56. See also, *id.* at 662-71, 681, reporting the confirmations of ten states; 3 BURNETT, LETTERS OF THE CONTINENTAL CONGRESS 317 (1921); BURNETT, THE CONTINENTAL CONGRESS 317, 472 (1941); JENSEN, THE ARTICLES OF CONFEDERATION 185-197 (1948).

220. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 12 (1824). Mr. Justice Johnson quoted these words of Witherspoon in his concurring opinion, *id.* at 224-25. See 19 JOURNALS OF THE CONTINENTAL CONGRESS 110 (Hunt ed. 1912).

221. *Id.* at 104. See 28 JOURNALS OF THE CONTINENTAL CONGRESS 201-05 (Fitzpatrick ed. 1933). Late in 1784, Virginia's delegate, James Monroe, was made chairman of a committee to re-study the question of trade regulation. In March, 1785, the Monroe committee proposed an amendment to the Ninth Article of Confederation, which would have provided for perpetual power to regulate trade with foreign nations and between the states, and would have included the power to levy imposts and duties on exports and imports. These powers were hedged about to meet the objectives of those opposed to nationalizing the powers of government: citizens of the member states were to pay no higher duties than foreign citizens, the member states reserved the power to prohibit the imports or exports of any goods, and all duties were to be collected by the states and were to go to the national treasury. The proposed amended ninth article provided as follows:

> The United States in Congress assembled shall have sole and exclusive right and power of determining on peace and war . . . entering into treaties and

ended his showing of the documentary steps in the making of the Constitution by reference to those historic Virginia resolutions of January, 1786, which he said were "the immediate cause of the convention" of 1787;[222] the "entire purpose for which the delegates assembled at Annapolis was to devise means for the uniform regulations of trade."[223] "[I]t will always be true, as matter of historic fact," Webster insisted, that the colonial statesmen had

found no means [to put trade under uniform regulations] but

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alliances, of regulating the trade of the States, as well with foreign Nations, as with each other, and of laying such imposts and duties upon imports and exports, as may be necessary for the purpose; provided that the Citizens of the States shall in no instance be subjected to pay higher imposts and duties, than those impostd on the subjects of foreign powers; provided also that the Legislative power of the several states shall not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatsoever; provided also that all such duties as may be imposed, shall be collected under the authority and accrue to the use of the State in which the same shall be payable. And provided lastly that every Act of Congress for the above purpose shall have the assent of nine States in Congress assembled. . . .

Id. at 201.

In the usual letter addressed to the legislatures of the several states, treaties with Sweden and the Netherlands were pointed to as making it "necessary that such internal arrangements should be made, as may strictly comply with the faith of those treaties and insure success to future negotiations." *Id.* at 202. The difficulties which followed thirteen separate legislatures acting as if each contained sovereign powers were noted at length. It was apprehended that "it will be difficult for thirteen different legislatures acting separately and distinctly to agree in the same interpretation of a treaty, to take the same measures, for carrying it into effect and to conduct their several operations upon such principles as to satisfy those powers, and at the same time to preserve the harmony and interests of the Union. . . ." *Id.* at 202. For these and other reasons the Monroe committee explained that it sought "an efficient and perpetual remedy," a perpetual nationalization of the powers of government over trade and the imposts and duties levied thereon. See also, *id.* at 345, 367. The Congress which assembled on Wednesday, July 13, 1785, defeated the proposal of the Monroe committee and it was never sent to the states. Those persons opposed to additions of powers of government to the Union were vigorous in their opposition, and those who wished to make necessary nationalizing of powers in effect had to fight a rear-guard action. Monroe wrote Jefferson, on July 15, 1785, when his report was under consideration: "Some gentlemen have inveterate prejudices against all attempts to increase the powers of Congress, others see the necessity but fear the consequences." 1 BANCROFT, FORMATION OF THE CONSTITUTION 445 (1882); 8 BURNETT, LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 166 (1936); 8 PAPERS OF THOMAS JEFFERSON 296 (Boyd ed. 1953). By letter of July 26, 1785, Monroe wrote to Madison at length on the same subject, setting out the affirmative and negative positions on the subject. It was argued in the negative, Monroe wrote "that it was dangerous to concentrate power, since it might be turn'd to mischievous purposes," that the proposals would "put us more in the power of other nations"; and "that all attacks upon the confederation were dangerous and calculated even if they did not succeed to weaken it." Significantly, Monroe stated to Madison, "I wish very much to have your sentiments on the subject." 8 BURNETT, LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 171, 172 (1936). For Madison's reply of August 7, 1785, see 2 WRITINGS OF JAMES MADISON 155 (Hunt ed. 1901). See also JENSEN, THE NEW NATION—A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789 403-04 (1950).

222. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 12 (1824).

223. *Ibid.*

> in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits and its blessings . . . its immediate origin [was to be found] in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system.[224]

Webster's presentations made in opposition to the concept of concurrent powers were vague and confused.[225] The withdrawal or alienation of state powers, by the concept of exclusive powers, came directly from the Constitution, and the point of time for this legal phenomenon was the point of time of adopting the Constitution—at the stroke of midnight presumably, September 17, 1788. The concept of concurrent powers was presented in opposition to this blanket alienation of state powers resulting from the adoption of the Constitution. By the concept of concurrent powers the Congress was authorized by the commerce clause to suspend state powers by the enactment of a national policy over a particularized subject matter. Suspension of state powers constituted a functional process of national legislative power which was exercised when the social needs appeared to require unitary regulations over specific problems. The crucial difference, obviously, between the opposing concepts of constitutional interpretation was concerned with the authority of the national judiciary to invalidate the state legislation which had impinged upon the private rights to be secured by nationalization. Constitutional interpretation by the concept of exclusive powers over commerce and trade would have allowed, and indeed it would have required the Supreme Court to use the authority of the commerce clause to invalidate the state franchise.

Webster appeared innocently unaware that the functioning of his exclusive power theory of the Constitution was substantially overcome by a *fait accompli.* In the thirty-five years after the adoption of the Constitution the nation's member states had greatly extended their police power regulations over subjects includable within the national powers to regulate commerce.[226] State regulations had extended over such sub-

224. *Id.* at 12-13. The state conventions supported the commercial necessity for adopting the Constitution and, in New York, Webster noted, the "argument arising from this consideration was strongly pressed, by the distinguished person whose name is connected with the present question [Robert R. Livingston]." *Ibid.*

225. See *id.* at 13-26.

226. Professor Albert S. Abel has published selective, and at the same time exhaustive, studies of the widespread activities of the state legislatures in general areas of commercial regulations in the period between the adoption of the Constitution and the

jects as the facilities and instrumentalities of transportation, as well as regulatory protections against disease and plagues and increasing poverty resulting from the ever expanding wave of European migration to the newly politically organized America.[227] Social demands for such state regulations were great indeed, for the extent and degree of Congress' policy regulations and administrative control in those areas were as minimal as in every other endeavor of government.[228]

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decision of the Supreme Court in *Gibbons v. Ogden.* See Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Facilities,* 25 N.C.L. REV. 122 (1947); Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Enterprises,* 18 MISS. L.J. 335 (1947); Abel, *Commerce Regulation Before Gibbons v. Ogden: Trade and Traffic* (pts. 1-2) 14 BROOKLYN L. REV. 38, 215 (1947-1948).

227. Much of the state legislation of this period had to do with connecting roads from and into other states, and with other arteries of transportation such as roads to ferries across connecting rivers and other bodies of water. See Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Facilities,* 25 N.C.L. REV. 122, 124-131 (1947).

While the Congress was authorized by the Constitution "To establish post-office and post-roads," state consent was given for post roads as for any other regulation of land highways by the national government. See, *e.g.,* the Act of the Maryland legislature of Jan. 10, 1803, ch. 115, titled, *An Act vesting certain powers in the Congress of the United States* to keep in repair post roads in the state, subject to the proviso that Congress shall have no right in the sale thereof nor divest any rights of turnpike owners. 3 Laws Md. 1802 (Kilty 1817), 1 Laws Md. 482 (Dorsey 1840).

State activities over intrastate and multi-state waterways were similar to that of the land roads, except they were much more extensive. Statutes pointed to preserving free navigation or restricting it, to dredging and straightening, to the combined cooperation of two or more states usually without the aid of the Congress, to the building of the extremely costly canals, the building of bridges, the granting of ferry licenses, and the making of harbor improvements. Federal activity was limited to such matters as the maintenance of some lighthouses which formerly were maintained by one or more of the member states. See, *e.g.,* Act of Aug. 7, 1789, ch. 9, 1 Stat. 53; Abel, *supra* at 131-47.

A general view of the national government's interest in matters of commerce on public waters was expressed in the House of Representatives: "The States have jurisdiction over all the navigable waters within their bounds; and where two States are separated by a river or bay, it would then be easy for a negotiation between those two States to provide security to their citizens from injury on such waters. Let not the General Government intermeddle with the States' policy. . . ." ANNALS OF CONG., 4th Cong. 2d Sess. 1734 (1849) [1796-1797].

Land roads and waterways required the paraphernalia of licensing and rate and safety regulations. Such regulations ranged widely over relationships of social intercourse and commerce that were multi-state and international in character. Goods and passengers were of equal concern and the states were heavily involved in the social and transportation problems resulting from the waves of immigration. See Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Enterprise,* 18 MISS. L.J. 335 (1947).

228. The Congress engaged in some regulation of public highways crossing state boundaries, though such control was made subject to the consent of the states through which such roads were constructed. See, *e.g.,* the Act of April 30, 1802, ch. 40, admitting Ohio into the Union, 2 Stat. 173. A proviso was inserted in section 7 of the Ohio statehood act reserving a proportion of the proceeds of the sale of public lands to be applied "to the laying out and making public roads, leading from the navigable waters emptying into the Atlantic, to the Ohio . . . such roads to be laid out under the authority of Congress, with the consent of the several states through which the road shall pass. . . ." Act of April 30, 1802, ch. 40, § 7, 2 Stat. 173.

How did Webster extricate himself from the legal consequence of the existing state regulations over the subjects of transportation, trade and commerce which were highlighted in the presentations of opposing counsel? Extrication was formulated in part upon a misconception amounting to something of an intellectual hypnosis about the theoretical relationship existing between the state and national governments. The national government and the member states were considered as separate and independent sovereign entities as if they were like the nation-states of England and France, which, subject to the law of nations, governed separate peoples living in separate territories. In order to make more effective his presentation of the exclusive power concept, Webster attempted to remove from the case the impact of the political and economic history which had given support to the decisions of Chancellor Kent in the New York courts. Webster used the dichotomy of independent legal sovereignties of the national and state governments in order to require that judicially formulated lines be drawn separating the powers of the respective governments. The concurrent power theory would have allowed an unlimited authority in the national government which, in the end, he contended, would cause destruction to the very existence of the nation's member states as governmental entities.

Thus, Webster turned the arguments of the states rights theories of the Constitution into a showing of horrible consequences that would befall the nation's member states if the concurrent power concept were ever adopted, instead of his more nationalistic exclusive power concept, as the dominating legal concept of constitutional theory and structure.[229] In

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By the Act of March 29, 1806, ch. 19, 2 Stat. 357, the Congress authorized the laying out and construction of the historic Cumberland Road. The President was authorized to make the decision as to the location of the road, and he was "further authorized and requested to pursue such measures, as in his opinion shall be proper, to obtain consent for making the road, of the state or states, through which the same has been laid out." Act of March 29, 1806, ch. 19, § 3, 2 Stat. 358. See also, Act of March 26, 1804, ch. 34, § 4, 2 Stat. 275 (regulation of post roads and duty of postmaster to make reports if the states do not keep such roads in repair); Act of May 15, 1820, ch. 123, 3 Stat. 604 (authorization for appointment of commissioners to lay out the extension of the Cumberland Road to the Mississippi River through Ohio, Indiana and Illinois); Act of April 21, 1806, ch. 41, 2 Stat. 396; Act of April 27, 1816, ch. 112, 3 Stat. 315; Act of March 3, 1817, ch. 69, 3 Stat. 377 (authorization of building of military roads under direction of Secretary of War, for which the Congress did not require the Secretary of War to secure consent of the member states through which the roads were to be laid. Parts of the road were to be constructed through territories).

229. Webster's own words were as follows:

> [T]he *concurrent* power of the States, concurrent though it be, is yet *subordinate* to the legislation of Congress; and that, therefore, Congress may, when it pleases, annul the state legislation; but, until it does so annul it, the state legislation is valid and effectual. . . . Here would be a perpetual hostility; one Legislature enacting laws, till another Legislature should repeal them; one sovereign power giving the rule, till another sovereign power should abrogate

order to support his main thesis of exclusive powers, and to secure its acceptance by certain members of the Supreme Court, Webster apparently felt that it was auspicious for him to contend that those subjects the states were then regulating, and had been regulating for the years after the Constitution, were not within the commerce clause authority of the national government.[230] Webster stated unequivocalily that such extensive regulations of intercourse between the states and between the states and foreign countries as were involved in the laws of pilotage, health and quarantine laws, were not commercial regulations and therefore these matters were not subject to regulations by the Congress.[231] In

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it; and all this under the idea of *concurrent* legislation.
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 24-25 (1824).

230. "The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term." *Id.* at 19. Webster recognized that states would continue to regulate those various subjects.

231. The reporter described Webster's statements on concurrent powers in the following:

> The pilot laws, the health laws, or quarantine laws, and various regulations of that class which have been recognized by Congress, are no arguments to prove, even if they are to be called commercial regulations, (which they are not), that other regulations, more directly and strictly commercial, are not solely within the power of Congress. There was a singular fallacy, as he humbly ventured to think, in the argument of very learned and most respectable persons, on this subject. That argument alleges that the states have a concurrent power with Congress, of regulating commerce; and its proof of this position is, that the states have, without any question of their right, passed acts respecting turnpike roads, toll bridges, and ferries. These are declared to be acts of commercial regulation, affecting not only the interior commerce of the state itself, but also commerce between different states. Therefore, as all these are *commercial regulations,* and are yet acknowledged to be rightfully established by the states, it follows, as is supposed, that the states must have a concurrent power to regulate commerce. . . .
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> To sustain the interference of the state, in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers. . . . [F]or it is admitted, that when Congress and the states have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the state power; and therefore, the consequence would seem to follow, from the argument, that all state legislation, over subjects as have been mentioned, is at all times, liable to the superior power of Congress; a consequence, which no one would admit for a moment. The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of the term. A road indeed might be a matter of great commercial concern. In many cases it is so; and when it is so, he thought there was no doubt of the power of Congress to make it. But, generally speaking, roads, and bridges, and ferries, though, of course, they affect commerce and intercourse, do not obtain the importance and elevation, as to be deemed *commercial regulations.* A reasonable construction must be given to the constitution; and such construction is as necessary to the just power of the states as to the authority of Congress. Quarantine laws, for example, may be considered as affecting commerce; yet they are, in their nature, *health laws.* . . .

the alternative, as a subsidiary contention, even if they were characterized as commercial regulations they could not be solely within the powers of the Congress because they were not so necessary a part of the nation's sovereignty as to fall within the concept of exclusive powers.[232]

By his advocacy Webster limited unduly the scope of the national powers, and assumed for judicial adjudication an apparent basis for invading Congress' legislative function of determining the scope of the powers of the national government.[233] But it is apparent that he expressed the following with something less than wholehearted acceptance:

> [B]ut if, under colour of it, enactments should be made for other purposes, such enactments might be void. . . .

Id. at 18-20.

232. As Webster anticipated, opposing counsel, Mr. Oakley and Mr. Emmet showed how the various member states had actually engaged in extended regulations respecting stages, turnpike roads, toll bridges, ferries, and like facilities of transportation, the importation of slaves and free negroes from the other states and from foreign countries, and the quarantine of persons coming into the member state from the other states and from foreign countries. See especially the arguments of Mr. Emmet, *id.* at 96-123.

233. The unanimous position of the Marshall Court in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), regarding the broad powers of the Congress to determine the scope of the powers of the national government in relation to nationalized policy over specific subject matter, and the extreme separation of powers limitations upon the authority and function of the Supreme Court to determine the limits of national powers, was substantially in conflict with the use of exclusive powers as a legal concept to invalidate state powers. Under that opinion judicial determination of national powers as a means to invalidate the exercise of state powers appeared to require a judicial determination of the scope of national powers. It was stated that the Supreme Court's authority to limit by the law of the Constitution the actual exercise of national powers was a limited authority. "We admit, as all must admit," Chief Justice Marshall wrote for the Supreme Court,

> that the powers of the government are limited, and that its limits are not to be transcended. But we think that the sound construction of the constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421.

Likewise, in substantial conflict with Webster's exclusive power thesis, was the Supreme Court's opinion in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), which determined that the national power to establish uniform laws on the subject of bankruptcies throughout the United States was not so exclusive as to withdraw state powers over the subject matters of debt and personal security. There it was said:

> It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease. It is not the mere existence of power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these

> If all these be regulations of commerce within the meaning of the Constitution, then, certainly, Congress, having a concurrent power to regulate commerce, may establish ferries, turnpikes, bridges, et cetera, and provide for all this detail of interior legislation. To sustain the interference of the State in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress, over a vast scope of internal legislation, which no one had heretofore supposed to be within its powers. But this is not all; for it is admitted that when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes State power; and therefore the consequence would seem to follow, from the argument, that all State legislation over such subjects as have been mentioned, is, at all times liable to the superior power of Congress, a consequence which no one would admit for a moment.[234]

Webster was confused in his assumption of the separateness and independence of the one government from the many. He expressed an apparent concern that regulations by the nation's member states which came within the national powers would have the effect of transforming the nation into a confederation. He could not comprehend how the Congress was able to regulate the same and similar subjects which the member states had regulated, and he confused constitutional authority with actual political power. Such a confusion was understandable, however, because the member states had the greater political support for the extended exercise of their powers. In order to preserve the national government, Webster thought that it was necessary to carve out exclusive powers for the national government from which the governments of the member states were excluded by the fundamental law of the Constitution. Webster argued:

> A power in the States to do anything, and everything, in regard to commerce, till Congress shall undo it, would suppose a state of things at least as bad as that which existed before the present Constitution. It is the true wisdom of these governments to keep their action as distinct as possible. The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States

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uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States.

Id. at 195-96.

234. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 19 (1824).

encroach on ground which the public good, as well as the constitution, refers to the exclusive control of Congress.[235]

Webster equated his theories of the Constitution with law, and they were supported by what he considered to be the sound administrative bases for the functioning of the national with the state governments. He moved from his notions of the sound administrative bases for the functioning of the national with the state governments, to constitutional theory, and thence to the equating of constitutional theory to legal concept, without distinguishing the one from the other. Most of all Webster lacked a clear conception of the role of judicial decision making, as distinct from the comparative legislative policy role of the Congress. Webster appeared to have a limited comprehension of the limitations of an independent judiciary and the institutional foundation of such limitations. Chancellor Kent saw more clearly that determining the scope of the legislative powers of the national government was not a matter for judicial lawmaking to use as a legal basis for the enforcement of private rights against the confiscation of those rights by a member state. Webster knew, or he felt, what the result should be—that somehow the Supreme Court should formulate national law from the authority of the Constitution in order to enforce the private legal rights in the freedom of movement by navigating upon public waters which the state had violated. But he was not able to conceive the proper basis for the Supreme Court's formulation of legal principles. His argument in the *Dartmouth College* case was much the superior in this regard, for the Supreme Court's role was more clearly and more directly drawn from the impairment of contract clause.[236] In *Dartmouth College* there was not the necessity to alienate large areas of government from the member states for transference to the Congress, and simultaneously, to alienate large areas of government from the Congress for transference to the member states, in order for the Supreme Court to secure the requisite authority from the Constitution to formulate the basic national law for securing private legal rights from confiscation and abridgment by the member states.[237]

At last Webster turned to the act of the Congress which licensed American vessels engaged in the coasting trade as authority for the nationalization of the freedom of navigating by steamboat upon public

235. *Id.* at 16-17.

236. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 551-600 (1819).

237. In *Dartmouth College v. Woodward,* if the College was determined not to be a "public corporation," the legislative enactment constituted a forfeiture, which as Webster stated could not have been within the authority of a legislature. "To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which, is the proper province of the judiciary." *Id.* at 558.

waters. Webster contended that, whether or not the state act was void because it was in conflict with the Constitution, it was at least "inoperative when the rights claimed under it came in collision with other rights, enjoyed and secured under the laws of the United States. . . ."[238] The act of the Congress enrolling ships characterized as "ships or vessels of the United States" and the licensing of such ships to engage in coasting trade, constituted a nationalization of the right to navigate such ships upon all the navigable waters within the confines and control of any state.[239] The private rights nationalized in the act of the Congress included the right to navigate ships of American character upon all public waters, whether such waters lay within the boundaries of one state or along the coast outside the borders of any state. The scope of the license "for carrying on the coasting trade" included any public stream, river, or body of water usable for movement by navigation.[240] Webster concluded that

238. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 27 (1824). In its decree the Supreme Court did not accept Webster's apparent distinction that the New York acts "were to be regarded as wholly void," when in conflict with the law formulated from the authority of the Constitution, and at least "inoperative" when in conflict with the law formulated from the authority of the act of the Congress regulating the coasting trade. In its decree the Supreme Court determined that:

> [T]he several licenses to the steamboats the Stoudinger and the Bellona, to carry on the coasting trade . . . which were granted under an act of Congress, passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding; and that so much of the several laws of the State of New York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York, by means of fire or steam, is repugnant to the said constitution, and void. . . .

Id. at 239-40.

239. The act referred to is the Act of Feb. 18, 1793, entitled *An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same,* ch. 8, 1 Stat. 305. Section 1 provided:

> That ships or vessels, enrolled by virtue of "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," [Act of Sept. 1, 1789, ch. 11, 1 Stat. 55] and those of twenty tons and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a license in force, or if less than twenty tons, not being enrolled shall have a license in force, as hereinafter required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.

240. In the state courts and in the Supreme Court the concern in the *Gibbons v. Ogden* litigation was the consequence of the license to engage in coasting trade, not the scope of the coasting waters. According to Chief Justice Marshall: "The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 214 (1824). Glimpses of the breadth of the coasting waters were given in the various acts of the Congress dealing with the enrolling, registry and licensing of coasting trade. The Act of Sept. 1, 1789, authorized "a license to trade between the different districts in the United States." Ch. 11, § 23, 1 Stat. 61. The Act of Feb. 18, 1793, superseding the above act, licensed a ship or vessel for carrying on the coasting trade, which was "destined from a district in one

the provision of the statute had no lesser effect than an act of Congress which should provide "that all vessels duly licensed should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable harbours, bays, rivers and lakes, within the several States, any law of the States, creating particular privileges as to any particular class of vessels, to the contrary notwithstanding. . . ."[241]

Chancellor Kent had not objected to the apparent unlimited scope given to "coasting waters" as including all public waters that were navigable.[242] But Webster had to question the great Chancellor in order to overcome the latter's determination that the licensing provisions added nothing to the enrolling provisions of the act and thus that the act did not

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state, to a district in the same, or an adjoining state on the sea-coast, or on a navigable river or bay of the United States." Act of March 12, 1812, ch. 40, 2 Stat. 694. An- allow the licensing of steamboats owned by resident aliens as if the same belonged to a citizen of the United States, if such steamboats were "intended to be employed only in a river or bay of the United States." Act of March 12, 1812, ch. 40, 2 Stat. 604. Another act supplementing the Act of Feb. 18, 1793, which also was unnoticed in *Gibbons v. Ogden,* stated:

> That for the more convenient regulation of the coasting trade, the seacoast and navigable rivers of the United States be, and hereby are, divided into two great districts; the first, to include all the districts on the seacoast and navigable rivers, between the eastern limits of the United States and the southern limits of Georgia, and the second, to include all the districts on the sea-coast and navigable rivers, between the river Perdido and the western limits of the United States. . . . That every ship or vessel . . . licensed to trade between the different districts of the United States, shall be, and is hereby authorized to carry on such trade between the districts included within the aforesaid great districts, respectively, and between a state in one, and an adjoining state in another, great district, in manner, and subject only to the regulations that are, now by law required to be observed by such ships or vessels, in trading from one district to another in the same state, or from a district in one state to a district in the next adjoining state, any thing in any law to the contrary, notwithstanding.

Act of March 2, 1819, ch. 48, §§ 1-2, 3 Stat. 492, 493.

241. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 29-30 (1824).

242. The scope of the coasting waters as it affected federal regulation of coasting trade was a large issue in litigation over whether the New York steamboat franchise acts were totally void or only partially so after *Gibbons v. Ogden.* In the case of North River Steamboat Co. v. John R. Livingston, 3 Cow. 713 (N.Y. Ct. Err. 1825), the minority, by Judge Woodworth, held that the language of the decree handed down in *Gibbons v. Ogden,* "that the license to carry on the coasting trade, gave full authority to navigate the waters of the United States, by steam or otherwise, *for the purpose of carrying on the coasting trade,* any law of the State of New York to the contrary notwithstanding," did not extend coasting trade to the internal waters and the internal trade of a state. *Id.* at 729-30. (Emphasis added.) The determination was based also upon the minority's interpretation of the commerce clause: one, it did not extend to internal trade, and, two, if it did it would come from incidental powers, as contrasted to expressed, which could not be exclusive.

The majority, in an able opinion by Chief Justice Savage, viewed the scope of coasting waters and coasting trade, as well as the Constitution and the Supreme Court's decree, more broadly, as applicable to navigable waters within a state and to navigation and trade between termini within a single state. According to Chief Justice Savage, commerce among the states means trade "among the people of the states," whether of a single state or of different states. *Id.* at 739, 745-53.

result in legal authority for the nationalizing of private rights which were judicially enforceable notwithstanding the existence of the state law in question. According to Chancellor Kent, the state and national statutes acted differently and independently upon the same subject matter. The act of the Congress laid down conditions for the characterization of the ship, being an American ship it was exempt from the taxes levied on foreign ships. The state act regulated the private property and private rights in the use and enjoyment of a steamboat within the state's geographical limits.

Webster disagreed with Chancellor Kent's requirement that the Congress had to legislate an explicit invalidation of an existing state law or an explicit withdrawal of state authority over the subject matter. Chancellor Kent had insisted that the state court's authority was too limited to decree an invalidation of state law from the implications to be drawn from the general purpose of the congressional act.[243] Webster advocated that the presence or absence of a *non obstante* clause could not affect the extent or operation of the act of Congress.[244] Congress had no distinct power of revoking state laws.[245]

Webster's answer missed the thrust of Chancellor Kent's determination as to the exercise of the Supreme Court's power to make an independent formulation of national law from the authority of an act of the Congress before it could be authoritatively determined that the state law was invalid. And Webster was in error on the workings of the Constitution, for the Congress was able to overrule or suspend state laws whether or not such laws were directly conflicting with Congress' enactments. For his second answer to Chancellor Kent, Webster advocated that once the Congress had legislated "over those subjects which are within its power, its legislation is supreme, and necessarily overrules all

243. See ch. V, *supra.*

244. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 29-31 (1824).

245. Webster insisted:

> Congress has no power of revoking state laws, as a distinct power. It legislates over subjects; and over those subjects which are within its power, its legislation is supreme, and necessarily overrules all inconsistent or repugnant state legislation. If Congress were to pass an act expressly revoking or annulling, in whole or in part, this New York grant, such an act would be wholly useless and inoperative. If the New York grant be opposed to, or inconsistent with, any Constitutional power which Congress had exercised, then, so far as the incompatibility exists, the grant is nugatory and void, necessarily, and by reason of the law of Congress. But if the grant be not inconsistent with any exercise of the powers of Congress, then, certainly, Congress has no authority to revoke or annul it. Such an act of Congress, therefore, would be either unconstitutional or supererogatory. . . .

Id. at 30-31.

inconsistent or repugnant State legislation."[246] His answer, which was based upon his theory of the separateness of the national government from the member states, assumed the main question. The ultimate question was the legal consequence of the license. Was it the nationalization of a basic right to navigate by steamboat upon the nation's public waters with which the state franchise was in conflict? By his contention that once the Congress had legislated over a subject or area state powers in the area were automatically withdrawn by the supremacy clause, Webster failed to recognize that conflict of state law with an act of the Congress was a matter of practical consequence, not totally of constitutional theory.

Webster failed to conceive of the more weighty contention in his behalf. The coasting act could have been construed in recognition of the legal principles of the law of nations: that navigation upon public waters was free except as a treaty or the Congress had imposed restrictions upon such freedom, though admittedly the act itself did not create nor formulate the principle of law in recognition of the freedom of navigation upon public waters. Much of the Constitution and the acts of the Congress were judicially enforced in recognition of existing principles of law. However, not all principles of law by which the nation's powers were to be administered could be written into the Constitution or incorporated into the various acts of Congress, any more than the administration of the nation's powers by the Congress could be limited to the precise language of the Constitution. The intellectual insight of Mr. Justice Johnson's concurring opinion, in which he recognized that private rights in the freedom of movement by navigation upon public waters were judicially enforceable from principles of law binding upon the national government as a sovereign nation-state under the laws of nations, manifested a requisite understanding of many sources of law which escaped the expanse of Webster's forensics.[247]

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246. *Id.* at 30.

247. *Id.* at 227-29. For Mr. Justice Johnson the coasting act enacted by the Congress did not add to the freedom of movement through navigation upon public waters as guaranteed by the Constitution. Mr. Johnson wrote as follows:

> If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed tomorrow, the right of the appellant to a reversal of the decision complained of, would be as strong as it is under this license. One half the doubts in life arise from defects of language, and if this instrument had been called an exemption instead of a license, it would have given a better idea of its character. . . .

Id. at 231-32.

VII. GIBBONS V. OGDEN—COUNSEL FOR THE NEW YORK FRANCHISE

Counsel argued for affirmance of the New York decree enforcing Colonel Ogden's exclusive right to operate a passenger steamboat between Elizabethtown Point, New Jersey, and Staten and Manhattan Islands.[248] The exclusive grant which Colonel Ogden had secured from the New York franchise could not, by itself, violate the law of the United States. The question presented was the impact of the exclusive grant upon other rights, *i.e.*, whether Mr. Gibbons' legal rights under the national law were violated, abridged, or confiscated by the New York decree. The crucial issue was the determination of whether Mr. Gibbons had legal rights under the national law to navigate by steamboat upon the public waters between the New Jersey coastline and the inhabited islands of New York Bay. Nevertheless, determination of the Court's jurisdictional authority from the Constitution to invalidate the New York acts and reverse the state court decree had to precede the determination of Gibbons' legal rights under national law, according to the modus operandi of the Marshall Court. Understandably, therefore, counsel for Colonel Ogden designed their presentations in order to deny the Supreme Court the jurisdictional authority to formulate the law of the United States that would nationalize the legal rights in Thomas Gibbons.

Counsel for Colonel Ogden made valiant efforts to restrict the scope of the national powers of the commerce clause.[249] The purpose was to

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248. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 33-79, 79-159 (1824).

249. Counsel also construed the patent and copyright clause: "Congress shall have power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8. The argument was based on the familiar concept of sovereignty in the states, limited power in the national government. Mr. Oakley stated the argument as follows:

> The power, considered in itself, is supreme, unlimited, and plenary. No part of any sovereign power can be annihilated. Whatever portion, then, of this power, was not granted to Congress, remains in the States. Consequently, the States have exclusive authority to promote science and the arts, by all other modes than those specified in the constitution, without limitation as to time, person, or object; and the Legislature is the sole judge of the expediency of any law on the subject.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 46 (1824). From this counsel argued that the state may control or prohibit the use of the patented object during the existence of the patent. Therefore "the right of prohibition" could be delegated to the Livingston and Fulton franchise; and the "mode of exercising that right" was by injunction in chancery. *Id.* at 59, 141-56. It was argued that since the Congress had no police powers under the patent and copyright provision of the Constitution, the power of regulating the property represented by patent remained in the states. Mr. Emmett argued:

> The power of regulating and prohibiting the use of every kind of property must be somewhere; it is a necessary part of legislative sovereignty, and must be intrusted to some constituted authority. As to all other kinds of property, it is undoubtedly in the State Legislatures. Things patented may be dangerous or noxious; they may be generally useful, and locally injurious; such, for in-

make it impossible for the Supreme Court to invalidate the New York decree from the authority of the Constitution. It was assumed without argument that the jurisdictional authority in the Supreme Court to formulate the national law from the authority of the Constitution was restricted to the scope of the national powers. Counsel, for this reason, insisted that the jurisdictional authority of the Supreme Court in article III was limited to the grants of Congress' powers in article I of the Constitution. This limitation upon the Court appeared to follow from the supposed necessity of invalidation of the state acts in order to reverse the state decree. With this in mind, counsel expended a large portion of their efforts arguing for the placing of strict limitations upon the scope of the national powers in the commerce clause. Alternatively, counsel used Mr. Webster's thesis of drawing negative implications to one's own advantage. The Supreme Court, counsel reasoned, could not possibly hold the authority to invalidate the New York decree unless the national powers in the commerce clause were exclusive and completely withdrawn from the member states. Since the commerce clause contained no exclusive powers, the Supreme Court had no authority to use the commerce clause against the powers of the member states. The Court's authority under the commerce clause was limited to the judicial enforcement and the nationalization of legal rights from the authority of an act of the Congress.

Counsel used constitutional theory to show that the scope of the national powers was severely limited. They cited various maxims about free and independent states.[250] It was emphasized as significant that the member states created themselves by their own act. By the Declaration of Independence, New York, whose statute was in question, and the other twelve states became free and independent states; each member state had full power to conduct war, conclude peace, contract alliances, establish commerce and commit any other act which a nation-state subject to the law of nations could commit.[251] New York thus was formed a sovereign and independent nation-state, and by its constitution its legislature was granted plenary powers.

In contrast, the Constitution of the United States created a national government of limited powers. Counsel followed closely the constitutional theories enunciated by St. George Tucker. Mr. Tucker considered that the larger, unlimited portion of the nation's sovereignty remained

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stance, might be torpedoes in a peaceful and commercial port; fire balloons and squibs in a populous city. . . .

Id. at 153.

250. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 33-34 (1824).

251. *Id.* at 33.

in the member states.[252] In light of this dichotomy of constitutional powers, the sovereignty of the member states moved from a position of weakness under the Articles of Confederation to a position of collective strength under the Constitution, from the separate sovereignties of weak, independent states to a collective sovereignty, divided between the states and the national government. By this mode of constitutional theory the national government acted much as an agent of the member states, representing the collective powers of the states.

In confirmation of Mr. Tucker's analysis of the Constitution, counsel argued that the scope of the national powers was "to receive the most strict construction that the instrument will bear, where the rights of a state . . . may be drawn in question."[253] Strict construction was to be a rule of constitutional law, in contrast to a presumption of constitutionality. The essential purpose of the rule of strict construction was to bind the Supreme Court to narrow limits of the supremacy of the national law. The rule also was to have political connotations of some significance. The Constitution was to be reconstructed in accord with the strongly held notions of Patrick Henry; the independent powers of the national government were to be narrowly conceived and the expanded portions of the nation's sovereign powers were to be reserved in the member states.

Counsel next construed the New York statutes and the New York decree as operating solely within the state and as not preventing the right of ingress or egress. The permanent injunction against Mr. Gibbons' entering upon the public waters of the state by steamboat was construed by counsel as prohibiting only movement from one part of the state to another. The owner of steamboats who wished to navigate upon New York waters had to secure a grant from the New York franchise. "A member state," counsel argued, "may exercise the same control . . . over land and water within its own jurisdiction; that the right as to barter rests on the same foundation, that of a sovereign over his domain."[254] Counsel construed the state regulation as "only an internal regulation of the use of the waters of the State. . . . These waters are a public highway, like any other public road on land, and, as such, are completely subject to the control of the State laws."[255]

252. TUCKER, *View of the Constitution of the United States,* in BLACKSTONE'S COMMENTARIES, Bk. 1, App. D, 140, 154 (Tucker ed. 1803).

253. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 87 (1824); TUCKER, *op. cit. supra* note 252.

254. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 74 (1824).

255. *Id.* at 74-75.

In the same vein counsel turned to the scope of the commerce clause. It was too limited to reach the area of the state regulation covered by the New York decree. The authority of the national government could not reach activities and associations wholly within the borders of a member state. The commerce clause had to be construed in accord with this general concept of the Constitution. The Congress was delegated no powers to regulate the internal commerce which was defined as that wholly within a state. In light of counsel's construction of the state statutes and the New York decree the Congress had no authority to regulate the freedom of movement by navigating by steamboat upon the public waters of New York.

It was argued that Congress' powers were limited to navigation between New York and foreign countries and New York and another state.[256] But counsel's concept of state sovereignty supported additional limitations upon Congress' powers to regulate commerce. The word "commerce" was given a legal definition which resulted in other limitations upon Congress' powers. Commerce was limited to trading. Congress' powers to regulate commerce were said to be limited to "the exchange of one thing for another; the interchange of commodities; trade or traffic."[257] As to navigation between New York and foreign countries and New York and another state, Congress' powers did not reach passengers. The transportation of passengers into and from a state did not constitute trading; trading was limited to commodities. According to the reasoning of counsel, freedom of movement and association between people of the different states could not be made a concern of the Congress, and therefore could not be nationalized in the law of the United States.

Counsel used the concurrent power concept as their final basis for denying the Supreme Court the jurisdictional authority to invalidate the New York statutes and to set aside the New York decree. Counsel agreed with Mr. Webster, since it was to their advantage to do so, that the Court had no jurisdiction to invalidate the acts of a member state from the authority of the Constitution except in instances where the national power had the characteristic of an exclusive power. To the extent that the commerce clause constituted the exclusive authority in the national

256. Counsel contended that Congress' power over ships or vessels exists "only in so far as they are instruments of foreign commerce, or of that between the different States; but in so far as the employment of a ship or vessel in navigating the waters of any State or States, has no connexion with the commerce which Congress has power to regulate; neither that employment nor its regulation or prohibition, falls within the purview of the federal constitution." *Id.* at 94-95.

257. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 89 (1824).

government, authority was permanently withdrawn from the police and public welfare powers of the member states. Thus the authority of the Court to nationalize legal rights in the freedom of movement by navigating public waters by steamboat depended on the determination that the commerce clause had created powers in the national government which were exclusive.

Understandably, counsel representing the validity of the New York franchise sought to narrowly restrict those national powers which were exclusive. Congress' powers to regulate commerce, counsel reasoned, were not exclusive because they were not made exclusive in express terms, *i.e.*, were not expressly prohibited to the member states, or were not necessarily exclusive in their nature.[258] The powers of the national government had to meet one of two tests if they were to be impliedly exclusive because of their nature, constituting what counsel called "strictly national powers." In order to be "strictly national" the commerce clause had to involve powers of government which did not previously exist in the member states and could not possibly exist in the states after the Constitution, or it had to involve powers which when exercised by a member state, had an inevitable and substantial effect without the member state.[259] The authority to borrow money on the credit of the United States was given as the first example of an exclusive and strictly national power; it could not possibly operate in a member state.[260] Laws of naturalization and citizenship were given as the second example of exclusive and strictly national powers, not because the Constitution prescribes that such laws must be "uniform," but because "a person becoming a citizen in one State would thereby become a citizen of another, perhaps even contrary to its laws, and the power thus exercised would operate beyond the limits of the State."[261] Thus, according to these tests,

258. *Id.* at 35.

259. *Ibid.* "A power exclusive in nature," Mr. Oakley explained was "repugnant and contradictory to a like power in the states. This repugnancy exists only in cases where a State cannot legislate, in any manner, or under any circumstances, under a given power, without conflicting with some existing act of Congress, or with some provision of the constitution." Mr. Oakley quoted from THE FEDERALIST No. 32, stating that it was "laid down by the commentators on the Constitution, that 'the power granted to the Union is exclusive, when the existence of a similar power in the States would be absolutely and totally contradictory and repugnant.'" Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 39 (1824). Thus, under this chaotic theory the jurisdictional authority of the Supreme Court to nationalize private rights and personal liberty in the law of the United States was dependent upon vague notions of "exclusive" or "concurrent" powers.

260. *Id.* at 36.

261. *Ibid.* Mr. Oakley's argument as to the exclusiveness of laws of naturalization was as follows:

> This power was originally in the States, and was extensively exercised by them, and would now be concurrent, except for another provision in the Constitution, that "citizens of each State shall be entitled to all the privileges and immunities

powers to regulate commerce belonged to the states before the adoption of the Constitution and were therefore concurrent powers.

This determination meant that state powers as complete as those of any other nation-state continued to exist following the adoption of the Constitution. There was no withdrawal by the Constitution of state powers over commerce. The exercise of such powers did not constitute the use of powers denied to the states by the Constitution, and could not violate the grant of powers to the national government by the Constitution. The final result of this syllogism was that the Supreme Court had no jurisdictional authority from the Constitution to void the state acts, and thus the Court was unable to nationalize the legal rights of Mr. Gibbons in the freedom of movement by navigation upon public waters. The Court was to be prevented from using the commerce clause as constitutional authority in the formulation of national law.

Counsel presented two additional propositions supporting the theory that Congress' powers to regulate commerce were concurrent. The legislative and administrative history of the Constitution showed that the commerce powers were nationalized in the Congress, but were not to be made exclusive and withdrawn from the member states. Counsel emphasized that according to the Monroe Committee report to the Congress and the Madison resolution to the Virginia House it was contemplated at all times that the member states should retain the authority to prohibit the importation of any article or person which was thought to be against the general welfare of the state.[262] At the very least, the powers of the state remained in operation unless and until the subject of the state pro-

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of citizens in the several States." It is not held to be exclusive, from the use of the term "uniform rule." This Court has held, that the use of an analogous term, "uniform laws," in respect to the associated subject of bankruptcy, does not imply an exclusive power in Congress over the subject. [Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819).]

Ibid.

262. Mr. Emmett reminded the Supreme Court that the Monroe Committee, in the Congress of the United States on Wednesday, July 13th, 1785, had recommended that the states be asked to grant the Congress the "sole and exclusive right and power . . . of regulating the trade of the states, as well with foreign nations as with each other," but subject to the proviso "that the legislative power of the several States shall not be restrained from prohibiting the importation or exportation of any species of good or commodities whatsoever." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 104 (1824). Mr. Emmet also cited a similar resolution proposed by Mr. Madison to the Virginia House of Delegates on Wednesday, November 30th, 1785. *Id.* at 105-06. Counsel's interpretation of legislative history of the commerce clause was that the absolute power of a sovereign nation-state to determine what goods and persons and ships were to enter its borders was to be preserved in the states. Counsel was willing to go so far as to admit, however, that "it is, perhaps, the fair construction of the instrument, that even their prohibitory legislation, is under the control of Congress as having paramount authority to regulate commerce; but valid until Congress shall have made regulations inconsistent with their laws." *Id.* at 106-07.

hibitory legislation actually was made subject to the control of the Congress. Secondly, counsel cited the mass of state regulation by which the states, relying on their general welfare powers, had actually assumed concurrent powers over commerce among the states and with foreign countries.[263] The state acts prohibiting and controlling the importation of goods and people were extensive. Counsel listed numerous statutes prohibiting the importation of slaves and other persons of color,[264] as

263. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 105-28 (1824).

264. In the debates of the Virginia Convention Mr. George Mason stated his well-known view that the slave trade "was one of the great causes of our separation from Great Britain," and that:

> The augmentation of slaves weakens the states; and such a trade is diabolical in itself, and disgraceful to mankind; yet, by this Constitution, it is continued for twenty years. As much as I value a union of all the states, I would not admit the Southern States into the Union unless they agree to the discontinuance of this disgraceful trade, because it would bring weakness, and not strength, to the Union. . . . And should the government be amended, still this detestable kind of commerce cannot be discontinued till after the expiration of twenty years. . . .

3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 452-53 (1836). Mr. Madison, the Constitution's floor leader, answered that the slave traffic was prohibited by "our laws." Regarding the clause under consideration, which provided that "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight," Mr. Madison instructed the convention that it "was a restraint on the exercise of a power expressly delegated to Congress; namely, that of regulating commerce with foreign nations." *Id.* at 453, 455. Significantly, perhaps, Mr. Madison limited the application of the exception to Congress' powers over the commerce with foreign countries, omitting Congress' powers over the commerce "among" the member states.

Mr. Randolph stated the legal consequence of the provision more broadly, as "an exception from the power of regulating commerce, and the restriction is only to continue till 1808. Then Congress can, by the exercise of that power, prevent future importations; but does it affect the existing state of slavery?" *Id.* at 598-99. Prior to the Virginia debates, on January 22, 1788, in THE FEDERALIST No. 42, as "Publics," Mr. Madison had referred to the provision as a "restriction on the general government," and "a great point gained in favor of humanity, that a period of twenty years may terminate for ever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy. . . ." THE FEDERALIST No. 42, at 261 (Lodge ed. 1888).

The immigration or importation of slaves clause of the Constitution could have been used elliptically, as an exception to Congress' exclusive authority over commerce, which was to be reactivated by the end of 1808, or as evidence that state powers were to remain in the states until the Congress had assumed exclusive control over the slave trade. Counsel for the franchise used the state acts which prohibited the importation of slaves as proof of concurrent powers in the states to regulate the right of entry into the state. With Congress' powers excepted for twenty years, until 1808, it was unthinkable that the states were denied the authority to prohibit the importation of slaves, especially in Virginia where the importation from the outside would have driven down the market price and decreased the capital of Mr. George Mason and other planters. New York's act prohibiting the importation and exportation of slaves was enacted in February, 1788, before the adoption of the Constitution. Act of Feb. 22, 1788, ch. 40, 2 N.Y. Laws 675. A similar act in Connecticut came in Oct., 1788, Conn. Stat. 1796-1802, 399; in Pennsylvania on March 29, 1788, ch. 1345, 13 Stat. 52; in Massachusetts on March 26, 1788, ch. 48, Mass. Acts & Laws 1786-1787, 615; and in Virginia on Dec. 12, 1793, ch. 23, 1 Stat. 239.

Counsel emphasized Congress' recognition of the power of the states to prohibit slave trade, by the Act of Feb. 28, 1803, ch. 10, which was titled *An Act to prevent the*

well as laws of quarantine prohibiting the entry of vessels into the waters and ports of the states.[265] Finally, counsel noted that Congress had recognized the states' concurrent powers to regulate seaport pilots.[266]

In the face of this array of authority, counsel reasoned that the Supreme Court could not have used the commerce clause as the authority to void the states acts. The Court was limited to a statute of the Congress, in the exercise of its paramount authority to regulate commerce, for the jurisdictional authority to void the acts of a state prohibiting the entry of a vessel onto its public waters. Likewise the Supreme Court was limited to the authority of an act of the Congress when it would nationalize legal rights in the freedom of movement by navigation upon the public waters of a member state.

VIII. GIBBSONS V. OGDEN—OPINION OF THE COURT

The climax in this stage of constitutional history came with the historic opinion of Chief Justice Marshall in *Gibbons v. Ogden*.[267] The legal development for this historic formulation of national law was long and tortuous. It was initiated by the Declaration of Independence, which ostensibly was planned as a political action to cut away the authority of the British sovereign from the new America, but resulted also in cutting away the legal structure of the British Constitution. The Great Declara-

importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited. 2 Stat. 205. The collectors and other officers of internal revenue were "enjoined vigilantly to carry into effect the said laws of said states" by which persons of color were prohibited from importation and general admission into the state, whether or not the person of color was brought in as a slave or came in as a freeman, a foreign national or citizen of a member state. Counsel asked a question: "How could Congress do this, if power prohibiting the trade were not unquestionably possessed by the States, in their sovereign capacity?" Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 112 (1824).

265. Mr. Webster, in opposition to the New York franchise, had classified the quarantine of ships and passengers from foreign countries and other states as laws of police, and not as laws of commerce. Counsel for the New York franchise agreed that quarantine laws were laws of police, but insisted that they were also laws of commerce, and as laws of commerce, the quarantine laws were subject to the concurrent powers of the state over commerce. Counsel stated that the quarantine laws were "all obviously direct regulations of trade, and so is the whole of every quarantine system." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 116 (1824). Mr. Tucker, who thought that the commerce powers were exclusive, emphasized that in 1796 Congress had given recognition to the validity of quarantine laws in the states. TUCKER, *op. cit. supra* note 252, at 251. By the Act of May 27, 1796, ch. 31, *An Act Relative to Quarantine*, the President of the United States was "authorized, to direct the revenue officers and the officers commanding forts and revenue cutters, to aid in the execution of quarantine, and also in the execution of the health laws, of the states, respectively, in such manner as may to him appear necessary." 1 Stat. 474. The Act of May 27, 1796, was repealed by the more extensive Act of Feb. 25, 1799, which required cooperation by port collectors with state quarantine laws. Ch. 12, 1 Stat. 619.

266. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 116-18 (1824).

267. 22 U.S. (9 Wheat.) 1, 186-222 (1824).

tion and the War for Independence reflected social transformations that marked a release of power in the various segments of a loosely organized community, necessitating the building of a nationalized legal structure of private rights.[268]

Initially the Articles of Confederation did not adequately provide a legal structure for the effectuation and enforcement of national policy, particularly in the areas of trade and commerce.[269] Thus it was in the building of a legal structure for a workable system of commerce under the Constitution that *Gibbons v. Ogden* became a focal adjudication in constitutional history.[270] The constitutional provisions for the nationalization of the legislative and administrative powers remained largely dormant and were not used for the formulation of national policy for building an effective system of commercial and social relationships. One of the essential ingredients in an effective system of commercial and social relationships was the freedom of movement by navigating the public waters, which then constituted the main arteries for commercial and social relationships.[271] The steamboat stirred expectations of benefits that might be derived if the freedom to navigate by steamboat upon the nation's public waters were preserved.

Freedom as a concept is developed in law through the nationalization of private rights and personal liberty and the judicial enforcement thereof. The primary question in this process of nationalization for the Supreme Court in *Gibbons v. Ogden* was to construct and prove by legal analyses the foundations of its authority to void the state franchise. Tentatively the Court relied upon the authority of the commerce clause for both the remedy to invalidate the state decree and the substantive law to secure the freedom of movement by navigation in the law of the United States. As in the use of a prerogative writ in Lord Coke's day, judicial review served to give court-made law the characteristic of autonomy and supremacy over the exercise of governmental powers.

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268. JENSEN, THE ARTICLES OF CONFEDERATION 159-76 (1948).

269. See, *e.g.*, JENSEN, *op. cit. supra* 107-84, 254-70; JENSEN, THE NEW NATION 350-74 (1950).

270. For general treatment of *Gibbons v. Ogden*, see, *e.g.*, 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 250-80 (1953); FRANKFURTER, THE COMMERCE CLAUSE 11-45 (1937); POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 49-53 (1956); RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 20-52 (1937); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 587-632 (rev. ed. 1926).

271. 1 BEVERIDGE, LIFE OF JOHN MARSHALL 259 (1916); FISKE, THE CRITICAL PERIOD IN AMERICAN HISTORY 61 (1888); 1 MORISON & COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 496-99 (4th ed. 1950); RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 27 (1937).

Judicial review in order to be effective had to insure that the law of the United States, as formulated by the Supreme Court, would not be overridden by the member states. The member states could not be conditioned to comply with the law of the United States except when the Constitution was violated by the states using powers denied to them by the Constitution. It was for this reason that Webster's exclusive power argument was used to require the remedy of constitutional invalidation in order to effectuate the law of the United States through the judicial enforcement of private rights and personal liberty. On the other hand, the underlying purpose of the concurrent power argument was to deny the Court the authority to use constitutional invalidation of state laws, in order to deny the Court the authority to nationalize private rights and personal liberty.

The *Gibbons v. Ogden* appeal finally presented the Marshall Court with the crucial and ultimate question of the Court's authority to use the commerce clause for the remedy of invalidation in order to effectuate the substantive law of the United States. In the lower courts Thomas Gibbons had claimed that he had legal rights to the use and enjoyment of property by navigating upon the public waters in New York by virtue of the license granted by an act of the Congress.[272] The possibility of using the commerce clause as the authority for the enforcement of such rights had been foreclosed in the New York courts by the binding precedent of *Livingston v. Van Ingen*.[273] In determining that such private rights as Thomas Gibbons had in navigating New York waters were controlled by state law and not by the act of the Congress, Chancellor Kent relied upon the legal concept that the use and enjoyment of private property were exclusively within state powers.[274] According to Chancellor Kent the coasting act of the Congress could not be construed to grant Thomas Gibbons a license in the nature of a right to navigate the public waters in New York. And should Thomas Gibbons have been granted explicitly such rights in the act of Congress by virtue of the coasting license, the act of Congress would have been subject to constitutional invalidation as

272. Gibbons v. Ogden, 4 Johns. Ch. R. 150, 153-54, 156-59 (N.Y. Ct. Ch. 1819); *aff'd*, 17 Johns. R. 488, 490-91 (N.Y. Ct. Err. 1820).

273. 9 Johns. R. 507 (N.Y. Ct. Err. 1812).

274. Gibbons v. Ogden, 4 Johns. Ch. R. 150, 157-58 (N.Y. Ct. Ch. 1819):

> However unquestionable the right and title to a specific chattel may be, and from whatever source that title may be derived, the use and employment of it must, as a general rule, be subject to the laws and regulations of the state. . . . The only limitation upon such a general discretion and power of control, is the occurrence of the case when the exercise of it would impede or defeat the operation of some lawful measure, or be absolutely repugnant to some constitutional law of the Union.

invading those aspects of the nation's sovereign authority reserved in the member states.[275] In these two historic opinions Chancellor Kent presented the Marshall Court with a supreme challenge.[276]

The essence of the Marshall opinion is that the Constitution recognized an existent nation with powers independent of, and not limited by, the existence of the member states.[277] Thus the normal functioning of powers of the member states was subject to the adjudication and judicial formulation of the law of the United States. It was within the judicial prerogative to determine the provision of the Constitution that was to be used to constitute the source of authority for the judicial formulation of the law of the United States. But the exercise of the invalidation remedy would depend more on necessity, *e.g.*, state regulation in the abridgement of basic rights and personal liberty. Thus the Court's authority in the functioning of the constitutional system could not be dependent upon Webster's thesis of exclusive powers, requiring the alienation of governmental powers from the member states in order to formulate national law for the adjudication of a particular case. The abridgement of basic rights inherent in fundamental freedoms secured by the law of the United States eventually would be sufficient to support the use of the invalidation remedy.[278]

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275. Chancellor Kent wrote:

> Suppose there was a provision in the act of congress, that all vessels, duly licensed, should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable bays, harbors, rivers and lakes within the several states, any law of the states, creating particular privileges as to any particular class of vessels, to the contrary notwithstanding; the only question that could arise in such a case, would be, whether the law was constitutional. If that was to be granted or decided in favor of the validity of the law, it would certainly, in all Courts and places, overrule and set aside the state grant.

Gibbons v. Ogden, 4 Johns. Ch. R. 150, 158 (N.Y. Ct. Ch. 1819).

276. Livingston v. Van Ingen, 9 Johns. R. 507, 572-90 (N.Y. Ct. Err. 1812); Gibbons v. Ogden, 4 Johns. Ch. R. 150, 156-59 (N.Y. Ct. Ch. 1819). In *Livingston v. Van Ingen* Kent recognized the paramount authority of the Congress to regulate commerce and that it might cause a collision with the state acts creating the exclusive franchise in steamboat navigation. But he concluded that Congress' concurrent jurisdiction over navigable waters of the state went "no further than may be incidental and requisite to the due regulation of commerce between the states, and with foreign nations." Livingston v. Van Ingen, *supra* at 579-80.

277. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824). The Marshall Court was not troubled by a constitutional theory and concept of state limitations upon the national government. The critical question for the Marshall Court was the constitutional limitations upon the member states. This was critical because it was thought to be a necessary determinant of authority in the Supreme Court to invalidate state acts, which in turn would secure the jurisdictional authority to nationalize private rights and personal liberty in the law of the United States.

278. The freedom from undue discrimination, as well as the substantial burden test, for example, constitute legal standards drawn from the authority of the commerce clause which nationalize in some degree the freedom of enterprise and association. See, *e.g.*, Welton v. Missouri, 91 U.S. 275 (1876); Southern Pacific Co. v. Arizona, 325 U.S.

The judicial prerogative was not the result of any particular provision of the Constitution, such as the commerce clause; authority for its exercise was the legal and political structure of the national government as reflected in the Constitution in its totality beginning with the Preamble "We the People . . . ." The Court emphasized that under the Constitution "the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which the change was effected."[279] This equivocal comment was sufficient, for the Constitution ought to be interpreted in terms of the objects of the nation's governmental structure, not solely in relation to the existence of the member states. The Court rejected counsel's contention that the Constitution must be strictly construed. The purpose for the narrow construction, as the Court stated it, was "in support of some theory not to be found in the constitution," that "would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument. . . ."[280] A narrow construction was rejected, for it "would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent. . . ."[281]

When the Court reached the commerce clause, it was still in the process of rejecting the state sovereignty presentations made by counsel for Colonel Ogden in behalf of the New York franchise. The Court rejected the contention that the power to regulate commerce was narrowly limited to the transportation of goods between the states, thus leaving he powers relating to such objects of government in the member states.[282]

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651 (1945). The most difficult job for the Supreme Court, by far, has been to determine its own function, as a court, to effectuate the judicial power. Its efforts to act as a constitutional court, determining law solely as divisions of powers of government, has provided an escape from its essential job; and sometimes the Court has welcomed this avenue of escape. See, *e.g.*, Morgan v. Virginia, 328 U.S. 373 (1946).

279. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824).

280. *Id.* at 188. As has been noted *supra,* in the discussion of the arguments of counsel for Colonel Ogden and the New York steamboat franchise, narrow construction of the Constitution was presented as a rule of constitutional law. It was posited upon the states' rights theory of the Constitution: that the nation's total sovereignty was reserved in the member states excepting a division of total sovereignty between the enumerated powers of the national government and the member states, and that there should be a strong presumption raised in opposition to the enumerated powers of the national government. There were numerous purposes behind the rule, *e.g.,* prohibition of implied and incidental powers in the national government, limitation of the supremacy clause of the Constitution to direct collisions of legislation enacted by the national and state legislatures, and restriction of the use of the Constitution as the principal authority for constructing the law of the United States.

281. Gibbons v. Ogden, 22 U.S. (9 Whea.) 1, 188 (1824).

282. *Id.* at 189.

"What is this power?" the Court asked for emphasis.[283] The power to regulate is "to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[284] Then in one of those crescendo passages for which Marshall's opinions are famous the Court pronounced:

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[285]

Thus the Chief Justice established the nationalized structure of the government under the Constitution; its powers were independent of the member states and were limited, as were the powers of the states, by the legal formulations of the Court when made from the authority of the Constitution.[286] The powers to regulate commerce were no more limited by the existence of the member states than the governmental powers in the war and treaty-making clauses.[287]

The independence of the national government having been established as the authority for the Court to formulate national law from the Constitution, it might have been anticipated that Marshall would formulate the legal principles of private rights in the freedom of movement by navigation. Instead Marshall expended a large portion of the Court's

283. *Id.* at 196.
284. *Ibid.*
285. *Id.* at 197.
286. The Court may use the constitutional authority of the due process clause or one of the other constitutional limitation clauses, instead of the commerce clause, when Congress unduly constricts freedom of enterprise, association, or other private rights and personal liberties. The consequence is appropriate and the concept of separation of powers gives less difficulty. See, *e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
287. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

opinion delineating the scope of the commerce clause.[288] It is this part of Marshall's opinion that has been troublesome in the course of subsequent constitutional adjudication.[289] In making this delineation, however, the Court did not contemplate the formulation of principles of law and legal standards that would move the Court into the political area of determining division and allocation of governmental powers between the national government and the member states.[290] The explicit purpose of delineating the scope of the commerce clause was to reject the state sovereignty limitations which would foreclose judicial review in the use of the invalidation remedy and the Court's authority to formulate the law of the United States.[291]

Determining the scope of the commerce clause had yet another purpose—to validate the Court's interpretation of the act of Congress as the source of the national law. In support of the independence of state sovereignty counsel had ignored the "power to regulate" phrase in the

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288. *Id.* at 197-209.

289. The procedure adopted by Marshall initially in expounding upon the extent of the Congress' power was

> that of taking up the component parts of the commerce clause for separate interpretation. . . . The method used in *Gibbons v. Ogden* may be construed as giving support to the implication, apparent in some later decisions, that there is or may be a satisfactory [legal] definition of commerce . . . which definition may be applied in all questions of state and federal power. . . .
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> Obviously some concept or concepts of . . . commerce must be used by the courts. Danger lies in the assumption that the term has one ready and consistent meaning and subsequent controversies may be decided by the rigorous application of propositions giving verbal expression to that meaning.

RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 25-26 (1937).

290. In no place does Chief Justice Marshall suggest, nor does he contemplate, that commerce, or Congress' power to regulate commerce, or commerce with foreign nations, or commerce among the states, etc., were subject to legal definitions in formulating and enforcing limitations upon the powers of Congress. His statement that commerce among the states was properly restricted to commerce "which concerns more states than one" was expository and in no sense constituted a legal definition limiting Congress' legislative authority over particular subject matter. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194, 197 (1824). See Marshall's explanation of the limited function of judicial review in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

291. With due respect to the many scholarly writings on the commerce clause, it was not the function of the Supreme Court to use the judicial powers to impose the national powers upon the member states; it was not the function of the Court to use constitutional interpretation and legal definitions to limit national powers; and it was not the function of the Court to use state sovereignty and external theories about the Constitution to impose legal limitations upon national powers. *Cf.* 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 17-292 (1953). The functioning of the member states provided the circumstances necessitating specific determinations of private rights and personal liberty. Such decisions, in turn, had to be justified in the formulations of the law of the United States. The jurisdictional authority for this had to come from the written Constitution of the United States. Sovereignty of the law required the strict compliance of the member states.

commerce clause and had attempted to narrowly define "commerce" as trade and the sale of goods. The Court's answer was that such an approach "would restrict a general term, applicable to many objects, to one of its significations."[292] The objects includible therein extended to intercourse and associations within the nation and with foreign countries, comprehending navigation in all its aspects as "one of the primary objects for which the people of America adopted their government."[293] A national policy relating to navigation did not exclude the waters within the borders of the states.[294] "The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states,"[295] and the power of the Congress to regulate commerce "comprehends navigation, within the limits of every State in the Union."[296]

Discussion of the scope of the commerce clause was not completed. The nationalized-independent structure of the government under the Constitution had been explained; the state sovereignty presentations made by counsel for the New York franchise had been totally rejected;[297] and the

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292. *Id.* at 189.

293. *Id.* at 190.

294. After concluding that the commerce power comprehends all aspects of navigation the Chief Justice turned to the general scope of the power. Regarding commerce with foreign nations, the commerce power was said to "comprehend every species of commercial intercourse between the United States and foreign nations." *Id.* at 193. Further, Congress' power to regulate commerce among the several states must be as comprehensive as the power to regulate commerce among the several states and foreign countries. The power "cannot stop at the external boundary line of each State, but may be introduced into the interior." *Id.* at 194. The power to legislate by use of the authority of the commerce clause may properly be exercised as to matters occurring within territorial jurisdiction of the member states, and not merely in regulating commercial activities, but also in promoting and regulating the association of the peoples of the varous member states and foreign countries. The word "commerce," included "intercourse" and the word "among" meant "commingling," and "intermingled with." This holding enlarged the jurisdiction of the Supreme Court to formulate the law of the United States which would result in the nationalization of private rights and personal liberty from the authority of the commerce clause.

In order to allay fears of arbitrary government and destruction of the member states, Marshall at this point attempted to show that national powers were not unlimited. He intended to delineate policy lines of authority, later to be drawn specifically by the Congress and not by the Supreme Court, except in those extreme cases when legal rights were confiscated or abridged. "Comprehensive as the word 'among' is," Marshall wrote, "it may very properly be restricted to that commerce which concerns more States than one." The action of the national government is limited "to those internal concerns which affect the States generally. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself." *Id.* at 194-95. See CORWIN, THE COMMERCE POWER VERSUS STATE RIGHTS 115-72 (1936); RIBBLE, STATE AND NATIONAL POWERS OVER COMMERCE 26-27 (1937); Stern, *That Commerce Which Concerns More States Than One,* 47 HARV. L. REV. 1335 (1934).

295. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

296. *Id.* at 197.

297. The only portions of the arguments made by counsel for Colonel Ogden and the New York franchise which the Court used and accepted as part of its opinion were the concurrent power presentations to the effect that the member states were adminis-

Court's authority to review the exercise of state powers under the commerce clause had been established. The Court was prepared to exercise its independent role in the constitutional scheme. Now the Court had to formulate the bases for the invalidation of state power. At the threshold of this question the Court faced the presentations made by Webster in representing Thomas Gibbons in the appeal. Webster had argued exclu-

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tering numerous statutes which greatly affected commerce among the states and with foreign nations. Chief Justice Marshall wrote:

> Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. . . . There is no analogy . . . between the power of taxation and the power of regulating commerce.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 198-200 (1824).

Marshall was wrong when he wrote that the constitutional restrictions on state power to place duties on exports and imports was solely a restriction on state taxing powers and not a prohibition against a state's imposing duties on commerce. *Id.* at 201-03. Certainly duties on goods imported and exported were considered as matters of commerce as well as a method of financing government.

Marshall admitted that the state's "inspection laws may have a remote and considerable influence on commerce. . . ." *Id.* at 203. But he stated that he would not admit that the source of these regulations was commerce. They were a part of the mass of regulations based upon the police and general welfare powers of the state.

> They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. . . .
>
> If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. . . . So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means.

Id. at 203-04.

Marshall admitted that acts of the Congress, Act of May 27, 1796, ch. 31, 1 Stat. 474, and Act of Feb. 25, 1799, ch. 12, 1 Stat. 619, which directed revenue officers to conform to the state's quarantine of ships and cargo laws, recognized that the state laws were constitutional. But the acts of the Congress did not "imply an acknowledgment that a State may rightfully regulate commerce with foreign nations or among the States. . . ." *Id.* at 205. Finally, Marshall stated the obvious as part of his scheme to give "constitutional play in the joints." POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 32 (1955).

> All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204 (1824).

sive powers and the concomitant alienation of such powers from the member states. The purpose behind the application of the exclusive power characteristics was to lay the foundation for the independent law making role of the Supreme Court from the commerce clause.[298] The Court accepted the purport of Webster's thesis, but it did not accept his exclusive power concept as a *necessary* foundation. The independent role of the Supreme Court to formulate national law from the authority of various provisions of the Constitution was drawn out of the historic perspective of law and judicial adjudication, and not from the peculiar language and nature of the national powers as compared with the member states.[299] Chief Justice Marshall adumbrated Webster's thesis of exclusive powers solely as a possibility but without its acceptance as a determination. The Court noted:

> It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. The regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

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298. In addition, the concept of "exclusive powers" appeared to reflect not so much the nature of commerce as the nature of the Constitution. Marshall had stated earlier:

> [T]he United States form for many, and for most important purposes, a single nation. . . . In war, we are one people. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. . . . These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413-14 (1821).

299. Mr. Justice Johnson applied the concept of man and the universality and sovereignty of law, prevalent in the eighteenth century, when he wrote: "The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824). The Supreme Court did not consider the New York franchise acts as "positive law." The conception of law, as the Court knew it, had natural law foundations. The "positive law," was universal and eternal; it was ideal law derived not from enactments nor from the magistrates, but from the nature of things. The freedom of commerce, therefore, was something of an expression of a principle which comprised part of the ideal law based on the nature of man as a rational, social being. There is at least "a ring" of Lord Coke's fundamental laws which he used against James I. See GOUGH, FUNDAMENTAL LAW IN ENGLISH HISTORY 30-47 (1955). There was more than a slight danger that the nation's member states would tear down the ideal law which was founded in the legal principles of mankind.

> There is great force in this argument, and the Court is not satisfied that it has been refuted.[300]

In its final determination the Court formulated the law enforcing the private rights in the freedom of movement by navigation from the authority of the act of Congress licensing coasting trade in American vessels.[301] The New York acts were held to be in conflict with the national law which the Court formulated from the act of Congress. The act of Congress was construed to support the nationalization of the principle of the freedom of navigation and the enforcement of private rights.

The breadth of the Court's function in the formulation of national law from the act of the Congress was as large, according to the Marshall Court, as if it had been formulated from the commerce clause.[302] The

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300. *Id.* at 209.

301. Act of Feb. 18, 1793, ch. 8, § entitled *An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same.* 1 Stat. 305 provided:

> That ships or vessels, enrolled by virtue of 'An act for registering and clearing vessels, regulating coasting trade, and for other purposes,' [Act of Sept. 1, 1789, ch. 11, 1 Stat. 55] and those of twenty tons and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a license in force, or, if less than twenty tons, not being enrolled, shall have a license in force, as is hereinafter required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or employed in the coasting trade or fisheries.

The Court construed section 1 "to contain a positive enactment, that the vessels it describes shall be entitled to the privileges of ships or vessels employed in coasting trade." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 212-13 (1824).

The Court drew the same inference from § 4 of the Act of Feb. 18, which it said, "directs the proper officer to grant to a vessel qualified to receive it, 'a license for carrying on the coasting trade'; and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, 'the license is hereby granted for the said steam-boat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer." Gibbons v. Ogden, *supra* at 213.

302. Marshall's legal analysis supported both of the two propositions: First, that the grant of a "license" to engage in coasting trade constituted the nationalization of a legal right in the freedom of movement by steamboat navigation to and from, as well as within, the public waters of a member state. The important matter which the Chief Justice emphasized was that the "license" constituted a legal right but in addition Marshall gave the broadest possible construction to "coasting waters"; it was well understood by everyone, according to Marshall, that "coasting waters" covered all waters which were navigable and public wherever situated. Thus the term included navigable, public waters entirely within the geographic borders of a member state as well as waters which lay between two or more states and waters which ran through two or more states. "Coasting waters" were not limited to admiralty and maritime jurisdiction where the tide ebbs and flows. Secondly, the Court constructed exclusive powers and the supremacy clause into the circumstance of the Congress having legislated upon the subject of ships or vessels or navigation.

As to the construction of the act of Congress Marshall wrote as follows:

> The word "license," means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. . . .

Court's determination was in no sense limited to the language of the act, or to the apparent intent and purpose of the Congress. The Court was inclined to the view that when the Congress legislated on a subject it had taken over the whole area or subject matter.[303] The state powers were thereby alienated from the whole area or subject matter though it could not be said that, solely by the act, the Congress had covered the field and

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The license must be understood to be what it purports to be, a legislative authority to the steamboat Bellona, "to be employed in carrying on the coasting trade, for one year from this date."

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 213-14 (1824). Marshall's construction of "coasting waters" is shown by the following sentence: "This act authorizes a steam boat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled or licensed as if the same belonged to a citizen of the United States." *Id.* at 221.

303. The act of the Congress in question involved commerce which Marshall considered to be unitary, as if it were a nationalized system, and also involved ships and navigation and public waters which under general, natural laws and the law of nations were not a proper subject of a private franchise. Marshall admitted that neither the enrolling statute nor the licensing of coasting trade statute specified the right to navigate by steamboat, to trade, or to carry passengers. And neither statute mentioned conflicing state laws, such as inspection and quarantine acts. However, the object of the license was "to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 215 (1824). In addition, the

> whole course of legislation on this subject shows [that] the power of Congress has been universally understood in America, to comprehend navigation . . . and . . . no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo. . . .

Id. at 215-16.

> Marshall expounded further:
> If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally, must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress.

Id. at 217. And finally:

> The laws of Congress for the regulation of commerce, do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces every thing that a Legislature thought it necessary to notice . . . every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, or sails or machinery.

Id. at 219-20. The point can properly be made that Marshall does not distinguish when he is construing the statute broadly in terms of the subject matter and when he is adding the weight of the constitutional grant of power over commerce to his concept of national power. The commerce clause adds to the act of Congress as much so as if the war and treaty-making powers were involved.

enacted a broad withdrawal of state powers.[304]

The Court thought it was immaterial whether the state laws were passed "in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police."[305] Gibbons' legal rights of navigation were the same, whether the ostensible authority was the commerce clause or an act of the Congress regulating the freedom of navigation in the coasting trade. In the process of formulating the law from the act of the Congress, the Court reveals the essential source of the legal principles in these words: "In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right and gave to Congress the power to regulate it."[306] Regulation included the power to secure such existing rights. Thus we see that much of the constitutional law of the United States is the formulation of law for the preservation of basic freedoms from confiscation and abridgement by the administration of the governments and subdivisions of the member states.[307]

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304. Before moving to the supremacy clause and the suspension or alienation of state powers Marshall took the occasion to answer one of the intensely held theories of the states' rights position in support of the nation's sovereignty in the member states.

> In argument . . . it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of [the Constitution] itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

305. *Id.* at 210. The Court explained: "In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . ."

306. *Id.* at 211.

307. Much of the fabric of the opinions of the Supreme Court which are based upon the fundamental authority of the commerce clause tended to treat the legal rights of the private complainant as nonexistent, as if the matter involved solely the allocation and accommodation of the governmental powers between the national government and the member states. Public policy occasionally played a role in the form of the concepts of free trade and free markets, as if these were legal concepts. Actually, however, the constitutional law based upon the authority of the commerce clause is something like that contemplated by the privileges and immunities clauses under which various legal

Mr. Justice William Johnson penned an able separate opinion. Reiterating his own views of the authority of the Court, he began by stating: "The judgment entered by the court in this cause, has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethern, I feel it incumbent on me to exhibit those views."[308] Johnson was rejecting the one-opinion mode which Marshall had successfully imposed upon the Court.[309] Thus he added: "I have, also, another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way."[310] Johnson's concurring essay contains one of the best statements in the bibliography of the Court on what the constitutional statesmen thought they were about in creating the Constitution. "The great and paramount purpose was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole *end;* the rest are nothing but the *means.*"[311]

The Constitution was to preserve the states too, to keep them from being driven to anarchy and ruin.[312] At the time of the making of the

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rights and freedoms involving freedom of movement, association, the enjoyment of one's property and the like, have been nationalized. In other words, the legal conclusion that the commerce clause has been violated and the declaration that the particular exercise of state powers is void because of an illegal discrimination or undue burden against the free flow of commerce are based upon the showing of an array of restrictions upon the use and enjoyment of private property, the freedom of movement and association, the right to live where one chooses, and like private rights and personal freedoms which have been nationalized. *Compare* Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) and Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), *with* Welton v. Missouri, 91 U.S. 275 (1876) and Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887). *Cf.* Dean Mills Co. v. Madison, 340 U.S. 349 (1951); H.P. Hood & Sons v. Dumond, 336 U.S. 525 (1949); Morgan v. Virginia, 328 U.S. 373 (1946); Edwards v. California, 314 U.S. 160 (1941).

308. *Id.* at 222-23.

309. Mr. Justice Johnson was expressing his own views of the constitutional authority of the commerce clause, views which he had expressed previously. At the same time he was aware of the desire of Chief Justice Marshall that only one opinion of the Court be handed down for posterity. The famous Marshall opinions upon the Constitution were a composite, or compromise between the active Justices. Mr. Justice Johnson was under considerable criticism from Thomas Jefferson and other Republicans for not returning to the seriatim opinions of the Supreme Court preceding Chief Justice Marshall. See MORGAN, JUSTICE WILLIAM JOHNSON 168-89 (1954).

310. *Id.* at 223.

311. *Ibid.*

312. One of the principal purposes of the Constitution, Johnson wrote, "was the independence and harmony of the States, that they may the better subserve the purposes of cherishing and protecting the respective families of their great republic. The strong sympathies, rather than the feeble government, which bound the States together during a common war, dissolved on the return to peace; and the very principles which gave rise to the war of the revolution, began to threaten the confederacy with anarchy and ruin." *Id.* at 223-24.

Constitution extensive regulations of commerce existed in each state.[313] While it would not have been possible for these regulations to have been immediately assumed by acts of the Congress, nevertheless Johnson thought that "those laws dropped lifeless from their statute books, for want of sustaining power, that had been relinquished to Congress. And the plain and direct import of the words of the grant, is consistent with this general understanding."[314] Congress' powers over commerce were those of a unitary sovereign state. "The power of a sovereign state over commerce . . . amounts to nothing more than a power to limit and restrain it at pleasure."[315] The extent of those powers was to be found in a state of peace under the law of nations, which was part of the law of the United States.[316] There was no drawing of lines of authority between the state and national powers which would have had the effect of placing state power limitations on the national government and on the independent authority of the Supreme Court to effectuate the law of the United States.[317]

Johnson ended his analysis with the following: "And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power

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313. Johnson wrote:

> For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests.
>
> This was the immediate cause, that led to the forming of a convention.

Id. at 224.

314. *Id.* at 226.

315. *Id.* at 227.

316. "The law of nations," which Johnson regarded as an universal law, "regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law." *Id.* at 227.

317. As a result of prior experience with South Carolina's Seamen Act Johnson had seen at first hand the severe conflict of state sovereignty with foreign relations. South Carolina's intransigence had embarrassed the administration of President Monroe. Johnson wrote accordingly:

> [T]he power to regulate foreign commerce is necessarily exclusive. The States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and security.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 228-29 (1824). See also MORGAN, JUSTICE WILLIAM JOHNSON 205-06 (1954).

must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."[318] Johnson's analysis was partially erroneous, as no elimination or denial of Congress' powers results from state regulation, and, except where there was the necessity of nationalizing certain private rights and privileges in commercial and general social intercourse, there was no extinguishment of state powers.[319] Johnson considered his writing as axiomatic—the essence of the matter—and appeared to be labouring to prove a self evident proposition.[320]

Johnson apparently did not comprehend that the Chief Justice had relied upon the traditional principles of the law of nations in formulating the national law from the act of Congress.[321] He followed Chancellor

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318. *Ibid.*

319. Johnson's views that the state of New York had no power to restrict commerce stemmed from his earlier views on the free right of commerce. "In 1808, he had defended his decision in the Embargo case [Gilchrist v. Collector, 10 Fed. Cas. 355, 360 (No. 5420) (C.C.D.S.C. 1808)] on the ground of a free right of commerce; it was incontestable, he had said, that unless restricted by law, every inhabitant of the nation had a perfect right to engage in commerce." MORGAN, JUSTICE WILLIAM JOHNSON 191 (1954).

320. At the time of Johnson's death great prestige had attached to the American judiciary. 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 150-52, 278-80 (Bradley ed. 1945). Johnson wrote of his legal position pointedly and with clarity, manifesting a sense of responsibility which he derived from his prestigious position. His was a gospel of judicial restraint. He assigned to judicial review a limited scope. He insisted that the Supreme Court should read grants of jurisdiction strictly. But notwithstanding, there was a universality and a sovereignty of the law which he pronounced. There was a broad purpose to substantive law, giving it character and furnishing him with criteria for his decisions.

Possibly Johnson was to a degree overcome by the majesty of the law. He probably would not have comprehended Professor Thomas Reed Powell, who wrote on more than one occasion about "Supreme Court Justices who seek to impress upon us in effect that it is not they that speak but the Constitution that speaketh in them. Somehow this reminds me of the biographer who wrote of Gladstone that his conscience was not his guide but only his accomplice." POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 28 (1956).

321. Marshall recognized the law of nations as a part of the law of the United States, encompassed by the supremacy clause and no longer a part of state sovereignty.

> In pursuing this inquiry at the bar, it has been said, that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). Naturally the power to regulate the rights recognized under the universal law of nations included the power to preserve and secure such legal rights from confiscation and extinction by acts of the member states. This the Congress had done:

> In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same. . . ." It will at once occur, that, when a Legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone, if the right itself be annihilated. It would be contrary to

Kent in limiting the Court's authority to the language of the act and the apparent purpose of Congress; the statute granted an exemption, not a license in the sense of a right to navigate by steamboat, though the word "license" was used in the statute. Johnson wrote: "I cannot overcome the conviction that if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license."[322] His point was well taken; the Court's decision would have been the same without the act of Congress as with it.

Finally the Court's decree is worthy of note: "[T]hat the several licenses to the steam boats the Stoudinger and the Bellona, to carry on coasting trade . . . which were granted under an act of Congress, passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on coasting trade, any law of the State of New York to the contrary notwithstanding. . . ."[323] The grant of the exclusive franchise that prohibited the private rights in free navigation was declared repugnant to the Constitution of the United States "and void."[324] The decree of the New York Court of Errors that affirmed the perpetual injunction incorporated in the decree of the Chancellor of New York, James Kent, was declared erroneous and "reversed and annulled."[325]

The great steamboat litigation was concluded. The legal structure had been built assuring judicial protection of commercial intercourse. For a considerable period there would be greater freedom in navigating the nation's public waters than in other areas. The commerce clause would be used as the principal authority for the constitutional invalidation remedy and for the formulation of national law securing private rights and personal liberty. The theory of exclusive powers was at the

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all reason, and to the course of human affairs, to say . . . that the State of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state. To the Court it seems very clear, that the whole act on the subject of the coasting trade, according to the principles which govern the construction of statutes [which deal with ships and rights of navigation], implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

Id. at 211-12. This analysis would require the Congress to enact affirmative legislation explicitly authorizing the states to interfere with ships or vessels and navigation, at least whenever the Congress had legislated on the subject; the Court construed the act as though the Congress legislated in contemplation of the general freedom of public waters.

322. *Id.* at 231-32.

323. *Id.* at 239-40.

324. *Id.* at 240.

325. *Ibid.*

threshold of giving way to the equally erroneous theory of interstate commerce and negative implication.[326]

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326. The adjective "interstate" has been imposed upon the commerce clause as a legal limitation upon the national powers. The Supreme Court has often used "interstate commerce" as a legal concept, denoting

> a broad type of activity having certain characteristics, fairly ascertainable, which determine the classification . . . [for the drawing of a line between] state and federal power. In accord with this idea, the Court has repeatedly felt free to give a definition of "interstate commerce," which definition contained no reference to the type of regulation before the Court, or to the source of the regulation, as federal or state. . . . A . . . book or . . . article . . . will recite instance after instance of activities being *held* to be or not to be "interstate commerce," without any intimation as to whether the case involved state or federal action, regulation or taxation. Such statements reflect the . . . idea of interstate commerce as an ascertainable thing, distinguishable [from intrastate commerce which likewise is assumed to be ascertainable]. . . .

RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 126 (1937). *Cf.* Stafford v. Wallace, 258 U.S. 495 (1922); Swift & Co. v. United States, 196 U.S. 375 (1905); Hopkins v. United States, 171 U.S. 578 (1898). See, *e.g.*, the opinion of Chief Justice Hughes in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 543 (1935): "Neither the slaughtering nor the sales by defendants were transactions in interstate commerce."

"Negative implications" of the commerce clause may be a meaningless epithet. Presumably it suggests that the jurisdictional authority of the Supreme Court to void state acts from the authority of the commerce clause is based upon a fiction. The Court had to devise a fiction of preserving national power, or of imposing national powers upon the states in order to invalidate acts of the state from the authority of the commerce clause. Yet the constitutional policy of freedom, which is found in the commerce clause, is no fiction. *Cf.* Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556-59, 583-88, 592-96 (1936); Freund, *Judicial Review and Federalism*, in SUPREME COURT AND SUPREME LAW 86, 100 (Cahn ed. 1954). See the opinion of Chief Justice Stone in Southern Pacific Co. v. Arizona, 325 U.S. 761, 768 (1945): "Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same."

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